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Doctor *and* Student:
OR
DIALOGUES
Between A
Doctor of Divinity,
AND
A Student in the Laws of ENGLAND,

Containing the GROUNDS of thoſe LAWS, together with Queſtions and Caſes concerning the Equity and Conſcience thereof; alſo comparing the *Civil*, *Canon*, *Common* and *Statute Laws*, and ſhewing wherein they vary from one another.

To which is now added an Account of the Author, and a General Table of the Principal Matters; never before printed.

In the SAVOY:
Printed by Eliz. Nutt and R. Goſling, (Aſſigns of *Edward Sayer*, Eſq;) *for* R. Goſling *at the* Middle-Temple-Gate *in* Fleet-ſtreet. 1721.

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THE

PREFACE.

THE *following Treatise, which, tho' often reprinted, has still appear'd without the Name of its Author, is nevertheless agreed to have been written by* Christopher St. German, *a Barrister of the* Inner-Temple, *who died, according to Mr.* Wood, *in his* Ath. Oxon. lib. 1. p. 48. *in the Year* 1540. Bale *says his Death happen'd in* 1539; *and Dr.* Fuller, *(or rather the Printer of his Book) transposing the two last Figures, makes it* 1593, *and this last says, he was descended of an ancient Family, lived to be extreamly old (being above* 80 *Years of Age when Death seised him) and that he was bury'd in the Church of* St. Alphage, London, *near* Cripplegate. *There is indeed some variance in the Authors who mention him in the Spelling of his Name, Sir* Edward Coke *Rep.* 7. 13. *b.* Calvin's Case, *writes it* St. Germin, *Dr.* Fuller, St. German, *Mr.* Wood, *and after him*

him the Bishop of Carlisle, Seintgerman; *but they all agree that he was the Author of these Dialogues.*

His Book was first published in Latin, *and has had several Editions in that Language under the Title of* Dialogus de fundamentis Legum Angliæ & de Conscientia; *but the* English *has some few Chapters more than the* Latin. *That it was translated by the Author himself; seems very probable from the Language and Style, which are the same throughout the whole; and that he did write some of the Chapters in* English *we have his own Authority for, in the Introduction to the second Part of these Dialogues,* p. 119. *where he gives the Reason of his not writing them in* Latin.

The Design of this Treatise is, to enquire into the Grounds and Reasons of the Common Law of England; *and to shew how consistent every of its Precepts, (how surprising soever they may appear at first Sight) are with right Reason and a good Conscience. A great many of the most curious and intricate Points of Law are stated with a Clearness that is extreamly pleasant and entertaining, as well as useful and instructive; and all the seeming Hardships and Difficulties in the Cases of Inheritance, Contract, Warranty, Wreck, Actions feign'd,* &c. *are made easy, and fairly reconcileable to* Moses and the Prophets.

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THE FIRST

DIALOGUE.

¶ *The Introduction.*

A Doctor of Divinity, that was of great Acquaintance and Familiarity with a Student in the Laws of *England*, said thus unto him; I have had a great Desire of long Time to know whereupon the Law of *England* is grounded: But because the most Part of the Law of *England* is written in the *French* Tongue, therefore I cannot, through mine own Study attain to the Knowledge thereof; for in that Tongue I am nothing expert. And because I have found thee a faithful Friend to me in all my Business, therefore I am bold to come to thee before any other, to know thy Mind, what be the very Grounds of the Law of *England*, as thou thinkest.

Stud. That would ask a great Leisure, and it is also above my cunning to do it: Nevertheless, that thou shalt not think that I would wilfully refuse to fulfil thy Desire, I shall with good-will do that in me is to satisfy thy Mind. But I pray thee that thou wilt first shew me somewhat of other Laws that pertain most to this Matter, and that Doctors treat of,

 how

how Laws have begun; and then I will gladly ſhew thee, as methinketh, what be the Grounds of the Law of *England*.

Doct. I will with good-will do as thou ſayeſt. Wherefore thou ſhalt underſtand, that Doctors treat of four Laws, the which (as me ſeemeth) pertain moſt to this Matter. The firſt in the *Law Eternal*. The ſecond is the *Law of Nature* of Reaſonable Creatures, the which, as I have heard ſay, is called by them that be learned in the Law of *England*, the *Law of Reaſon*. The third is the *Law of God*. The fourth is the *Law of Man*. And therefore I will firſt treat of the *Law Eternal*.

CHAP. I.

Of the *Law Eternal*.

LIKE as there is in every Artificer a Reaſon of ſuch-like Things as are to be made by his Craft: So likewiſe it behoveth that in every Governor there be Reaſon and a Foreſight in the governing of ſuch Things as ſhall be ordered and done by him to them that he hath the Governance of. And foraſmuch as Almighty God is the Creator and Maker of all Creatures, to the which he is compared as a Workman to his Works, and is alſo the Governor of all Deeds and Movings that be found in any Creature: Therefore as the Reaſon of the Wiſdom of God (inaſmuch as Creatures be created by him) is the Reaſon and Foreſight of all Crafts and Works that have been or ſhall be; ſo the Reaſon of the Wiſdom of God, moving all

all Things by Wisdom made to a good End, obtaineth the Name and Reason of a Law, and that is called the Law Eternal.

And this Law Eternal is called the first Law: And it is well called the first, for it was before all other Laws, and all other Laws be derived of it: Whereupon St. Augustine saith, in his 1 Book of Free Arbitrement, that in Temporal Laws nothing is righteous ne lawful, but that the People have derived to them out of the Law Eternal. Wherefore every Man hath Right and Title to have that he hath righteously, and of right wise Judgment of the first Reason, which is the Law Eternal.

Stud. But how may this Law Eternal be known? For, as the Apostle writeth in the second Chapter of his First Epistle to the Corinthians, Quæ sunt Dei nemo scit, nisi Spiritus Dei; that is to say, No Man knoweth what is in God but the Spirit of God; wherefore it seemeth that he openeth his Mouth against Heaven, that attempteth to know it.

Doct. This Law Eternal no Man may know as it is in itself, but only blessed Souls that see God face to face. But Almighty God of his Goodness sheweth of it as much to his Creatures as is necessary for them, for else God should bind his Creatures to a Thing impossible: Which may in no wise be thought in him. Therefore it is to be understood, that three Manner of Ways Almighty God maketh this Law Eternal known to his Creatures reasonable. First, by the Light of Natural Reason; Secondly, by Heavenly Revelation; Thirdly, by the order of a Prince or any other secundary Governor that hath Power to bind his Subjects to a Law.

And when the Law Eternal or the Will of God is known to his Creatures reasonable by the Light of natural Understanding, or by the Light of natural Reason, that is called the Law of Reason: And when it is shewed by heavenly Revelation in such Manner as hereafter shall appear, then it is called the Law of God: And when it is shewed unto him by the Order of a Prince, or of any other secundary Governor that hath a Power to set a Law upon his Subjects, then it is called the Law of Man, though originally it be made of God. For Laws made by Man that hath received thereto Power of God, be made by God. Therefore the said three Laws, that is to say, the Law of Reason, the Law of God, and the Law of Man, the which hath several Names after the Manner as they be shewed to Man, be called in God one Law Eternal.

And this is the Law of which it is written Proverbiorum octavo, where it is said, Per me reges regnant, & Legum conditores justa discernunt; that is to say, By me Kings reign, and Makers of Laws discern the Truth. And this sufficeth for this Time for the Law Eternal.

CHAP. II.

¶ Of the *Law of Reason*, the which by Doctors is call'd the *Law of Nature* of reasonable Creatures.

First it is to be understood, that the Law of Nature may be considered in two Manners, that is to say, generally and specially. When it is considered generally, then it is referred to all Creatures, as well reasonable as unreasonable: For

For all unreasonable Creatures live under a certain Rule to them given by Nature, necessary for them to the Conservation of their Being. But of this Law it is not our Intent to treat at this Time. The Law of Nature specially considered, which is also called the Law of Reason, pertaineth only to Creatures reasonable, that is, Man, which is created to the Image of God.

And this Law ought to be kept as well among Jews and Gentiles, as among Christian Men: And this Law is alway good and righteous, stiring and inclining a Man to Good, and abhorring Evil. And as to the ordering of the Deeds of Man, it is preferred before the Law of God, and it is written in the Heart of every Man, teaching him what is to be done, and what is to be fled: And because it is written in the Heart, therefore it may not be put away, ne it is never changeable by no Diversity of Place, ne Time: And therefore against this Law, Prescription, Statute nor Custom may not prevail: And if any be brought in against it, they be not Prescriptions, Statutes nor Customs, but Things void and against Justice. And all other Laws, as well the Laws of God as to the Acts of Men, as other, be grounded thereupon.

Stud. Sith the Law of Reason is written in the Heart of every Man, as thou hast said before, teaching him what is to be done, and what is to be fled, and the which thou sayest may never be put out of the Heart, what needeth it then to have any other Law brought in to order the Acts and Deeds of the People?

Doct. Though the Law of Reason may not be changed, nor wholly put away; nevertheless before the Law written, it was greatly lett and blinded by evil Customs, and by many Sins of the People, beside our Original Sin; insomuch that it might hardly be discerned what was righteous and what was unrighteous, and what was good, and what evil. Wherefore it was necessary, for the good Order of the People, to have many Things added to the Law of Reason, as well by the Church as by Secular Princes, according to the Manners of the Country and of the People where such Additions should be exercised. And this Law of Reason differeth from the Law of God in two Manners. For the Law of God is given by Revelation of God; and this Law is given by a natural Light of Understanding. And also the Law of God ordereth a Man of it self, by a nigh way, to the Felicity that ever shall endure; and the Law of Reason ordereth a Man to the Felicity of this Life.

Stud. But what be the Things that the Law of Reason teaches to be done, and what to be fled? I pray thee shew me.

Doct. The Law of Reason teacheth, that Good is to be loved, and Evil is to be fled: Also that thou shalt do to another, that thou wouldest another should do unto thee; and that we may do nothing against Truth; and that a Man must live peacefully with others; That Justice is to be done to every Man; and also, that Wrong is not to be done to any Man; and that also a Trespasser is worthy to be punished; and such other. Of the which follow divers other secundary Commandments, the which be as necessary Conclusi-

ons

ons derived of the first. As of that Commandment, that Good is to be beloved; it followeth, that a Man should love his Benefactor: For a Benefactor, in that he is a Benefactor, includeth in him a Reason of Goodness, for else he ought not to be called a Benefactor, that is to say, a good Doer, but an evil Doer: And so in that he is a Benefactor, he is to be beloved in all Times, and in all Places. And this Law also suffereth many Things to be done: As that it is lawful to put away Force with Force; and that it is lawful for every Man to defend himself and his Goods against an unlawful Power. And this Law runneth with every Man's Law, and also with the Law of God, as to the Deeds of Man, and must be always kept and observed, and shall alway declare what ought to follow upon the general Rules of the Law of Man, and shall restrain them if they be any Thing contrary unto it.

And here it is to be understood, that after some Men, the Law whereby all Things were in Common, was never of the Law of Reason, but only in the Time of extreme Necessity. For they say, that the Law of Reason may not be changed; but they say, it is evident, that the Law whereby all Things should be in Common, is changed: Wherefore they conclude, that was never the Law of Reason.

CHAP. III.

¶ Of the *Law of God.*

THE Law of God is a certain Law given by Revelation to a reasonable Creature, shewing him the Will of God, willing that Creatures reasonable be bound to do a Thing, or not to do it, for obtaining of the Felicity eternal. And it is said, for the obtaining of the Felicity eternal, to exclude the Laws shewed by Revelation of God for the Political Rule of the People, the which be called Judicials. For a Law is not properly called the Law of God, because it was shewed by Revelation of God, but also because it directed a Man by the nearest Way to the Felicity eternal; as been the Laws of the Old Testament, that been called Morals, and the Laws of the Evangelists, the which were shewed in much more excellent Manner than the Law of the Old Testament was: For that was shewed by the mediation of an Angel; but the Law of the Evangelists was shewed by the Mediation of our Lord Jesus Christ, God and Man. And the Law of God is alway righteous and just, for it is made and given after the Will of God. And therefore all Acts and Deeds of Man be called righteous and just, when they be done according to the Law of God, and be conformable to it. Also sometime a Law made by Man, is called the Law of God. As when a Law taketh his principal Ground upon the Law of God, and is made for the Declaration or Conservation of the

Faith,

Faith, and to put away Heresies, as divers Laws Canon, and also divers Laws made by the common People, sometime do; the which therefore are rather to be called the Law of God, than the Law of Man. Yet nevertheless all the Laws Canon be not the Laws of God: For many of them be made only for the political Rule and Conservation of the People. Whereupon John Gerson, in the Treatise of the Spiritual Life of the Soul, the second Lesson, and the third Corollary, saith thus; All the Canons of Bishops nor their Decrees be not the Law of God: For many of them be made only for the political Conversation of the People. And if any Man will say, Be not all the Goods of the Church spiritual, for they belong unto the Spiritualty, and lead to the Spiritualty? We answer, That in the whole political Conversation of the People there be some specially deputed and dedicated to the Service of God, the which most specially (as by an Excellency) are called spiritual Men, as religious Men are. And other, though they walk in the Way of God, yet nevertheless, because their Office is most specially to be occupied about such things as pertain to the Commonwealth and to the good Order of the People, they be therefore called Secular Men or Lay Men; Nevertheless, the Goods of the first may no more be called Spiritual than the Goods of the other, for they be things mere temporal, and keeping the Body, as they do in the other. And by like Reason, Laws made for the political Order of the Church be called many times spiritual, or the Laws of God; nevertheless it

it is but improperly: And other be called Civil, or the Laws of Man. And in this Point many be oft times deceived, and also deceive other, the which judge the things to be spiritual, the which all Men know be things temporal and carnal. These be the Words of John Gerson in the Place alledged before. Farthermore, beside the Law of Reason and the Law of Man, it was necessary to have the Law of God, for four Reasons.

The first, because Man is ordained to the End of the eternal Felicity, the which exceedeth the Proportion and Faculty of Man's Power. Therefore it was necessary that beside the Law of Reason and the Law of Man, he should be directed to his End by the Law of God.

Secondly, forasmuch as for the Uncertainty of Man's Judgment, specially of things peculiar and seldom falling, it happeneth oft-times to follow divers Judgments of divers Men, and Diversities of Laws; therefore, to the Intent that a Man without any doubt may know what he should do, and what he should not do, it was necessary that he should be directed in all his Deeds by a Law heavenly, given by God, the which is so apparent, that no Man may swerve from it, as is the Law of God.

Thirdly Man may only make a Law of such things as he may judge upon, and the Judgment of Man may not be of inward things, but only of outward things; and nevertheless it belongeth to Perfection that a Man be well ordered in both, that is to say, as well inward as outward. Therefore it was necessary to have

have the Law of God, the which should order a Man as well of inward things as of outward things.

The fourth is, because, as St. Augustine saith in his first Book of Free Arbitrement, the Law of Man may not punish all Offences: For if all Offences should be punished, the Commonwealth should be hurt, as is of Contracts; for it cannot be avoided, but that as long as Contracts be suffered, many Offences shall follow thereby, and yet they be suffered for the Commonwealth. And therefore that no Evil should be unpunished, it was necessary to have the Law of God that should leave no Evil unpunished.

CHAP. IV.

¶. Of the *Law of Man*.

THE Law of Man (the which sometime is called the Law positive) is derived by Reason, as a thing which is necessary, and probably following of the Law of Reason, and of the Law of God. And that is called probable, in that it appeareth to many, and especially to wise Men to be true. And therefore in every Law positive well made, is somewhat of the Law of Reason, and of the Law of God; and to discern the Law of God and the Law of Reason from the Law positive, is very hard. And though it be hard, yet it is much necessary in every moral Doctrine, and in all Laws made for the common Wealth. And that the Law of Man be just and rightwise, two things be

be necessary, that is to say, Wisdom and Authority. Wisdom that he may judge after Reason, what is to be done for the Communalty, and what is expedient for a peaceable Conversation and necessary Sustentation of them; Authority, that he have Authority to make Laws. For the Law is derived of Ligare, that is to say, to bind. But the Sentence of a wise Man doth not bind the Communalty, if he have no Rule over them. Also to every good Law be required these Properties; that is to say, that it be honest, rightwise. possible in it self, and after the Custom of the Country, convenient for the Place and Time, necessary, profitable, and also manifest, that it be not captious by any dark Sentences, ne mixt with any private Wealth, but all made for the common Wealth. And after St. Bridget, in the 4 Book, in the hundred twenty-ninth Chapter, every good Law is ordained to the Health of the Soul, and to the fulfilling of the Laws of God, and to induce the People to fly evil Desires, and to do good Works. Also the Cardinal of Camerer writeth, Whatsoever is righteous in the Law of Man, is righteous in the Law of God. For every Man's Law must be consonant to the Law of God. And therefore the Laws of Princes, the Commandments of Prelates, the Statutes of Communalties, ne yet the Ordinance of the Church is not righteous nor obligatory, but it be consonant to the Law of God.

And of such a Law of Man that is consonant to the Law of God, it appeareth who hath Right to Lands and Goods, and who not:

For whatsoever a Man hath by such Laws of Man, he hath righteously; and whatsoever he hath against such Laws, is unrighteously had.

For Laws of Man not contrary to the Law of God, nor to the Law of Reason, must be observed in the Law of the Soul: And he that despiseth them, despiseth God, and resisteth God. And furthermore, as Gratian saith, because evil Men fear to offend for Fear of Pain; therefore it was necessary that divers Pains should be ordained for divers Offences, as Physicians ordained divers Remedies for several Diseases. And such Pains be ordained by the Makers of Laws, after the Necessity of the Time, and after the Disposition of the People. And though that Law that ordained such Pains hath thereby a Conformity to the Law of God, (for the Law of God commandeth that the People shall take away Evil from amongst themselves;) yet they belong not so much to the Law of God, but that other Pains (standing the first Principles) might be ordained and appointed therefore. That is the Law that is called most properly the Law positive, and the Law of Man.

And the Philosopher said in the third Book of his Ethicks, that the Intent of a Maker of a Law is to make the People good, and to bring them to Vertue. And although I have somewhat in general shewed thee whereupon the Law of England is grounded, (for of Necessity it must be grounded of the said Laws, that is to say, of the Law eternal, of the Law of Reason, and of the Law of God:) nevertheless I pray thee shew me more specially whereupon it is grounded,

ed, as thou thinkest, as thou before hast promised to do.

Stud. I will with Good-will do therein that lieth in me, for thou hast shewed me a right, plain, and straight Way thereto. Therefore thou shalt understand, that the Law of England is grounded upon six principal Grounds. First, it is grounded on the Law of Reason. Secondly, on the Law of God. Thirdly, on divers general Customs of the Realm. Fourthly, on divers Principles that be called Maxims. Fifthly, on divers particular Customs. Sixthly, on divers Statutes made in Parliaments by the King, and by the Common Counsel of the Realm. Of which Grounds I shall speak in order as they be rehearsed before. And first of the Law of Reason.

CHAP. V.

¶ Of the first Ground of the Law of *England*.

THE first Ground of the Law of England is the Law of Reason, whereof thou hast treated before in the 2 Chap. the which is kept in this Realm, as it is in all other Realms, and as of Necessity it must needs be, (as thou hast said before.)

Doct. But I would know what is called the Law of Nature after the Laws of England.

Stud. It is not used among them that be learned in the Laws of England to reason what thing is commanded or prohibited by the Law of Nature, and what not, but all the reasoning

ing in that behalf is under this Manner. As when any thing is grounded upon the Law of Nature, they say, that Reason will that such a thing be done; and if it be prohibited by the Law of Nature, they say it is against Reason, or that Reason will not suffer that to be done.

Doct. Then I pray thee shew me what they that be learned in the Laws of the Realm hold to be commanded or prohibited by the Law of Nature, under such Terms and after such Manner as is used among them that be learned in the said Laws.

Stud. There be put by them that be learned in the Laws of England two Degrees of the Law of Reason, that is to say, the Law of Reason primary, and the Law of Reason secondary. By the Law of Reason primary be prohibited in the Laws of England Murder, (that is, the Death of him that is innocent) Perjury, Deceit, Breaking of the Peace, and many other like. And by the same Law also it is lawful for a Man to defend himself against an unjust Power so he keep due Circumstance. And also if any Promise be made by Man as to the Body, it is by the Law of Reason void in the Laws of England. The other is called the Law of secundary Reason, the which is divided into two Branches, that is to say, into a Law of secundary Reason general, and into a Law of secundary Reason particular. The Law of a secundary Reason general is grounded and derived of the general Law or general Custom of Property, whereby Goods moveable and immoveable be brought into a certain Property, so that every Man may know his own thing.

thing. And by this Branch be prohibited in the Laws of England Disseisins, Trespass in Lands and Goods, Rescous, Theft, unlawful With-holding of another Man's Goods, and such other. And by the same Law it is a Ground in the Law of England, that Satisfaction must be made for a Trespass, and that Restitution must be made of such Goods as one Man hath that belong to another Man, the Debts must be paid, Covenants fulfilled, and such other. And because Disseisins, Trespass in Lands and Goods, Theft, and other, had not been known, if the Law of Property had not been ordained; therefore all things that be derived by Reason out of the said Law of Property be called the Law of Reason secundary general, for the Law of Property is generally kept in all Contracts.

The Law of Reason secundary particular is the Law that is derived of divers Customs general and particular, and of divers Maxims and Statutes ordained in this Realm. And it is called the Law of Reason secundary particular, because the Reason in that Case is derived of such a Law that is only holden for Law in this Realm, and in none other Realm.

Doct. I pray thee shew me some special Case of such a Law of Reason secundary particular for an Example.

Stud. There is a Law in England, which is a Law of Custom, that if a Man take a Distress lawfully, that he shall put it in Pound overt, there to remain till he be satisfied of that he distrained for. And then thereupon may be asked this Question, that if the Beasts die in

Pound for lack of Meat, at whose Peril die they? Whether die they at the Peril of him that distrained, or of him that oweth the Beasts?

Doct. If the Law be as thou sayest, and that a Man for a just Cause taketh a Distress, and putteth it in the Pound overt, and no Law compelleth him that distrained to give them Meat, then it seemeth of Reason, that if the Distress die in Pound for lack of Meat, that it died at the Peril of him that oweth the Beasts, and not of him that distrained; for in him that distrained there can be assigned no Default, but in the other may be assigned a Default, because the Rent was unpaid.

Stud. Thou hast given a true Judgment, and who hath taught thee to do so, but Reason derived of the said general Custom? And the Law is so full of such secundary Reasons derived out of the general Customs and Maximes of the Realm, that some Men have affirmed that all the Law of the Realm is the Law of Reason. But that cannot be proved, as me seemeth, as I have partly shewed before, and more fully will shew after. And it is not much used in the Laws of England, to reason what Law is grounded upon the Law of the first Reason primary, or on the Law of Reason secundary, for they be most commonly openly known of themselves; but for the Knowledge of the Law of Reason secundary is greater Difficulty, and therefore therein dependeth much the Manner and Form of Arguments in the Laws of England.

And it is to be noted, That all the deriving of

of Reason in the Law of England proceedeth of the first Principles of the Law, or of something that is derived of them: And therefore no Man may rihhtwisely judge, ne groundly reason in the Laws of England, if he be ignorant in the first Principles. Also all Birds, Fowls, wild Beasts of Forest and Warren, and such other, be excepted by the Laws of England out of the said general Law and Custom of Property: For by the Laws of the Realm no Property may be of them in any Person, unless they be tame. Nevertheless the Eggs of Hawk, Herons, or such other as build in the Ground of any Person, be adjudged by the said Laws to belong to him that oweth the Ground.

CHAP. VI.

Of the second Ground of the Law of *England*:

THE second Ground of the Law of England is the Law of God: And therefore for Punishment of them that offend against the Law of God, it is enquired in many Courts in this Realm, if any hold any Opinion secretly or in any other Manner against the true Catholick Faith; and also if any general Custom were directly against the Law of God, or if any Statute were made directly against it: As if it were ordained that no Alms should be given for no Necessity, the Custom and Statute were void. Nevertheless the Statute made in the 34 Year of King Edward 3d whereby it is ordained that no Man under Pain of Imprisonment shall give any Alms to any valiant Beggers that may well labour, that they may

so

to be compelled to labour for their Living, is a good Statute, for it observeth the Intent of the Law of God. And also by Authority of this Law there is a Ground in the Laws of England, that he that is Accursed shall maintain no Action in the King's Court, except it be in very few Cases; so that the same Excommunication be certified before the King's Justices in such Manner as the Law of the Realm hath appointed. And by the Authority also of this Ground the Law of England admitteth the spiritual Jurisdiction of Dismes and Offerings, and of all other things that of Right belong unto it; and receiveth also all Laws of the Church duly made, and that exceed not the Power of them that made them. Insomuch that in many Cases it behoveth the King's Justices to judge after the Laws of the Church.

Doct. How may that be, that the King's Justices should judge in the King's Courts after the Law of the Church? for it seemeth that the Church should rather give Judgment in such things as it may make Laws of, than the King's Justices.

Stud. That may be done in many Cases, whereof I shall for an Example put this Case: If a Writ of Right of Ward be brought of the Body, &c. And the Tenant confessing the Tenure, and the Nonage of the Infant, saith, That the Infant was married in his Ancestor's Days, &c. whereupon 12 Men be sworn, which give this Verdict, that the Infant was married in the Life of his Ancestor, and that the Woman in the Life of his Ancestor sued a Divorce, whereupon Sentence was given that they should

should be divorced, and that the Heir appealed, which hangeth yet undiscussed, praying the Aid of the Justice to know whether the Infant in this Case shall be said married or no: In this Case, if the Law of the Church be that the said Sentence of Divorce standeth in his Strength and Virtue until it be annulled upon the said Appeal, that the Infant at the Death of his Ancestor was unmarried, because the first Marriage was adnulled by that Divorce, and if the Law of the Church be, That the Sentence of the Divorce standeth not in Effect till it be affirmed upon the said Appeal; then is the Infant yet married, so that the Value of his Marriage cannot belong unto the Lord: And therefore in this Case Judgment conditional shall be given, &c. And in like wise the King's Justices in many other Cases shall judge after the Law of the Church, like as the spiritual Judges must in many Cases form their Judgment after the King's Laws.

Doct. How may that be, that the spiritual Judges should judge after the King's Laws? I pray thee shew me some certain Case thereof.

Stud. Though it be somewhat a Digression from our first Purpose, yet I will not withsay thy Desire, but will with Good-will put thee a Case or two thereof, that thou mayest the better perceive what I mean. If A. and B. have Goods jointly, and A. by his last Will bequeath his Portion therein to C. and maketh the said B. his Executor, and dieth, and C. asketh the Execution of this Will in the spiritual Court: In this Case the Judges there be bound to judge that Will to be void, because it is

void

void by the Laws of this Realm. And likewise if a Man be outlawed, and after, by his Will, bequeath certain Goods to John at Stile, and make his Executors, and die, the King seiseth his Goods, and after giveth them again to the Executors, and after John at Stile sueth a Citation out of the spiritual Court against the Executors, to have Execution of the Will: In this Case the Judges of the spiritual Court must judge the Will to be void, as the Law of the Realm is that it is; and yet there is no such Law of Forfeiture of Goods by Outlawry in the spiritual Law.

CHAP. VII.

Of the third Ground of the Law of *England*.

THE third Ground of the Law of England standeth upon divers general Customs of old time used through all the Realm, which have been accepted and approved by our Sovereign Lord the King, and his Progenitors, and all his Subjects. And because the said Customs be neither against the Law of God, nor the Law of Reason, and have been alway taken to be good and necessary for the common Wealth of all the Realm; therefore they have obtained the Strength of a Law, insomuch that he that doth against them, doth against Justice: And these be the Customs that properly be called the Common Law. And it shall alway be determined by the Justices whether there be any such general Custom or not, and not by 12 Men. And of these general Customs,

Customs, and of certain Principles that be called Maximes, which also take Effect by the old Custom of the Realm, (as shall appear in the Chapter next following) dependeth most Part of the Law of this Realm. And therefore our Sovereign Lord the King, at his Coronation, among other things, taketh a solemn Oath that he shall cause all the Customs of his Realm faithfully to be observed.

Doct. I pray thee shew me some of these general Customs.

Stud. I will with Good-will: And first, I shall shew thee how the Custom of the Realm is the very Ground of divers Courts in the Realm, that is to say, of the Chancery, of the King's Bench, of the Common Pleas, and the Exchequer, the which be Courts of Record; because none may sit as Judges in these Courts, but by the King's Letters Patents. And these Courts have divers Authorities, whereof it is not to treat at this Time. Other Courts there be also only grounded by the Custom of the Realm, that be of much less Authority than the Courts before rehearsed. As in every Shire within the Realm there is a Court that is called the County, and another that is called the Sheriff's Torne; and in every Manor is a Court that is called a Court-Baron, and to every Fair and Market is incident a Court that is called a Court of Pipowders. And though in some Statutes is made mention sometime of the said Courts; yet nevertheless, of the first Institution of the said Courts, and that such Courts should be, there is no Statute nor Law written in the Laws of England. And so all

all the Ground and Beginning of the said Courts depend upon the Custom of the Realm; the which Custom is of so high Authority, that the said Courts, ne their Authorities, may not be altered, ne their Names changed, without Parliament.

Also by the old Custom of the Realm, no Man shall be taken, imprisoned, disseised, nor otherwise destroyed, but he be put to answer by the Law of the Land: And this Custom is confirmed by the Statute of Magna charta, cap. 26.

Also by the old Custom of the Realm, all Men great and small shall do and receive Justice in the King's Courts: And this Custom is confirmed by the Statute of Marlb. cap. 1.

Also by the old Custom of the Realm, the eldest Son is only Heir to his Ancestor; and if there be no Sons, but Daughters, then all the Daughters shall be Heirs. And so it is of Sisters and other Kinswomen. And if there be neither Son, Daughter, Brother, nor Sister, then shall the Inheritance descend to the next Kinsman or Kinswoman of the whole Blood to him that had the Inheritance, of how many Degrees soever they be from him. And if there be no Heir general nor special, then the Land shall escheat to the Lord of whom the Land is holden.

Also by the old Custom of the Realm, Lands shall never ascend or descend from the Son to the Father or Mother, nor to any other Ancestor on the Right Line, but it shall rather escheat to the Lord of the Fee.

Also if any Alien have a Son that is an Alien, and after is made Denizen, and hath an

other Son, and after purchaseth Lands, and dieth; the youngest Son shall inherit as Heir, and not the Eldest.

Also if there be three Brethren, and the middest Brother purchase Lands, and dieth without Heir of his Body; the eldest Brother shall inherit as Heir to him, and not the younger Brother.

And if Land in Fee-simple descend to a Man by the Part of his Father, and he dieth without Heir of his Body; then the Inheritance shall descend to the next Heir of the Part of his Father. And if there be no such Heir of the Part of his Father, then if the Father purchaseth the Lands, it shall go to the next Heir of the Father's Mother, and not to the next Heir of the Son's Mother, but it shall rather escheat to the Lord of the Fee. But if a Man purchase Lands to him and to his Heirs, and die without Heir of his Body, as is said before; then the Land shall descend to the next Heir of the Part of his Father, if there be any; and if not, then to the next Heir of the Part of his Mother.

Also if the Son purchaseth Lands in Fee, and dieth without Heir of his Body; the Land shall descend to his Uncle, and shall not descend to his Father: But if the Father have a Son, though it be many Years after the Death of the elder Brother, yet that Son shall put out his Uncle, and shall enjoy the Lands as Heir to the elder Brother for ever.

Also by the Custom of the Realm the Child that is born before Espousals is Bastard, and shall not inherit.

Also the Custom of the Realm is, that no Manner of Goods nor Chattels, real nor personal, shall ever go to the Heir, but to the Executors, or to the Ordinary, or Administrators.

Also the Husband shall have all the Chattels personals that his Wife had at the Time of the Espousals or after, and also Chattels real, if he overlive his Wife: But if he sell or give away the Chattels real and die, by that Sale or Gift the Interest of the Wife is determined, or else they shall remain to the Wife, if she overlive her Husband. Also the Husband shall have all the Inheritance of his Wife, whereof he was seised in Deed in the Right of his Wife during the Espousals, in Fee, or in Fee-tail general, for Term of Life, if he have any Child by her, to hold as Tenant by the Curtesy of England; and the Wife shall have the third Part of the Inheritance of her Husband, whereof he was seised in Deed or in Law after the Espousals, &c. But in that Case the Wife at the Death of her Husband must be of the Age of nine Years, or above, or else she shall have no Dowry.

Doct. What if the Husband at his Death be within the Age of nine Years?

Stud. I suppose she shall yet have her Dower. Also the old Law and Custom of the Realm is, that after the Death of every Tenant that holdeth his Land by Knight's Service, the Lord shall have the Ward and Marriage of the Heir, till the Heir come to the Age of twenty-one Years; and if the Heir in that Case be of full Age at the Death of his Ancestor, then he shall pay to his Lord his Relief, which at the Common Law

was not certain, but by the Statute of Magna charta it is put in certain; that is to say, for every whole Knight's Fee to pay C s. and for a whole Barony to pay 100 Marks for Relief, and for a whole Earldom to pay C l. and after that Rate. And if the Heir of such a Tenant be a Woman, and she, at the Death of her Ancestor, be within the Age of fourteen Years, then by the Common Law she should have been in Ward only till fourteen Years, but by the Stat. of W. 1. in such Case she shall be in Ward till sixteen Years. And if at the Death of her Ancestor she be of the Age of fourteen Years, or above, she shall be out of Ward, though the Land be holden of the King, and then she shall pay Relief as an Heir male shall.

Also of Lands holden in Socage, if the Ancestor die, his Heir being within the Age of fourteen Years, the next friend to the Heir, to whom the Inheritance may not descend, shall have the Ward of his Body and Lands till he shall come to the Age of fourteen Years, and then he may enter. And when the Heir cometh to the Age of twenty-one Years, then the Guardian shall yield him an Accompt for the Profits thereof by him received.

Also such an Heir in Socage, for his Relief, shall double his Rent to the Lord the Year following the Death of his Ancestor: As if his Ancestor held by 12 d. Rent, the Heir in the Year following shall pay the 12 d. for his Rent, and other 12 d. for his Relief; and the Relief he must pay, though he be within Age at the Death of his Ancestor.

Also there is an old Law and Custom in this Realm, that a Freehold by Way of Feoffment,

Gift,

Gift, or Lease, passeth not without Livery of Seisin be made upon the Land according, though a Deed of Feoffment be thereof made and delivered: But by Way of Surrender, Partition, and Eschange, a Freehold may pass without Livery.

Also if a Man make a Will of Land whereof he is seised in his Demesne as of Fee, that Will is void: But if it had stood in Feoffee's Hands it had been good. And also in London such a Will is good by the Custom of the City, if it be enrolled.

Also a Lease for Term of Years is but a Chattel by the Law, and therefore it may pass without any Livery of Seisin: But otherwise it is of a State for Term of Life, for that it is a Freehold in the Law, and therefore Livery must be made, or else the Freehold passeth not.

Also by the old Custom of the Realm a Man may distrain for Rent-service of common Right, and also for a Rent reserved upon a Gift in Tail, a Lease for Term of Life, of Years, and at Will: And in such Case the Lord may distrain the Beasts of Tenants as soon as they come upon the Ground; but the Beasts of Strangers that come in but by Manner of an Escape he may not distrain, till they have been levant and couchant upon the Ground. But for Debt upon an Obligation, nor upon a Contract, nor for Account, ne yet for Arrearages of Account, nor for no Manner of Trespass, Reparations, nor such other, no Man may distrain.

And by the old Custom of the Realm all Issues that shall be joined between Party and Party in any Court of Record within the Realm, except a Few whereof it needeth not to treat at this Time, must be tried by twelve free and lawful Men of the Visne, that be not of Affinity to none of the Parties: And in other Courts that be not of Record, as in the County, Court-Baron, Hundred, and such other like, they shall be tried by the Oath of the Parties, and not otherwise, unless the Parties assent that it shall be tried by the Homage. And it is to be noted, that Lords, Barons, and all Peers of the Realm be excepted out of such Trials, if they will; but if they will wilfully be sworn therein, some say it is no Error: And they may, if they will, have a Writ out of the Chancery directed to the Sheriff, commanding him that he shall not impanel them upon no Enquest.

And of this that is said before it appeareth, that the Customs aforesaid, or other like unto them, whereof be very many in the Laws of England, cannot be proved to have the Strength of Law only by Reason. For how may it be proved by Reason that the eldest Son shall only inherit his Father, and the younger to have no part; or that the Husband shall have the whole Land for Term of his Life as Tenant by the Curtesy, in such Manner as before appeareth, and that the Wife shall have only the third Part in the Name of her Dower; and that her Husband shall have all the Goods of his Wife as his own, and that if he die the Wife living, that his Executors shall have the Goods, and not the Wife?

All

All these and such other cannot be proved only by Reason, that it should be so, and no otherwise, although they be reasonable; and that, with the Custom therein used, sufficeth in the Law, and a Statute made against such general Customs ought to be observed, because they be not meerly the Law of Reason.

Also the Law of Property is not the Law of Reason, but the Law of Custom, howbeit that it is kept, and is also most necessary to be kept, in all Realms, and among all People; and so it may be numbred among the general Customs of the Realm. And it is to understand that there is no Statute that treateth of the Beginning of the said Customs, ne why they should be holden for Law; and therefore after them that be learned in the Laws of the Realm, the old Custom of the Realm is the only and sufficient Authority to them in that Behalf. And I pray thee shew me what Doctors hold therein, that is to say, whether a Custom only be a sufficient Authority of any Law.

Doct. Doctors hold that a Law grounded upon a Custom is the most surest Law: But this thou must always understand therewith, that such a Custom is neither contrary to the Law of Reason, nor the Law of GOD. And now I pray thee shew me somewhat of the Maxims of the Laws of England, whereof thou hast made mention before in the 4th Chapter.

Stud. I will with good will.

CHAP. VIII.

Of the fourth Ground of the Law of *England*.

THE fourth Ground of the Law of England standeth in divers Principles that be called in the Law Maxims, the which have been always taken for Law in this Realm, so that it is not lawful for any that is learned to deny them; for every one of those Maxims is sufficient Authority to himself. And which is a Maxim, and which not, shall alway be determined by the Judges, and not by twelve Men. And it needeth not to assign any Reason why they were first received for Maxims, for it sufficeth that they be not against the Law of Reason, nor the Law of God, and that they have always been taken for a Law. And such Maxims be not only holden for Law, but also other Cases like unto them, and all Things that necessarily follow upon the same are to be reduced to the like Law; and therefore most commonly there be assigned some Reasons or Considerations why such Maxims be reasonable, to the Intent that other Cases like may the more conveniently be applied to them. And they be of the same Strength and Effect in the Law as Statutes be. And though the general Customs of the Realm be the Strength and Warrant of the said Maxims, as they be of the general Customs of the Realm; yet because the said general Customs be in a Manner known through the Realm, as well to them that be unlearned as learned, and may lightly

lightly be had and known, and that with little Study, and the Maxims be only known in the King's Courts, or among them that take great Study in the Law of the Realm, and among few other Persons; therefore they be set in this Writing, for several Grounds, and he that listeth may so account them, or if he will, he may take them for no Ground, after his Pleasure. Of which Maxims I shall hereafter shew thee part.

First, there is a Maxim, that Escuage uncertain maketh Knight's-Service.

Also there is another Maxim, that Escuage certain makes Socage.

Also, that he that holdeth by Castle-guard holdeth by Knight's-Service, but he holdeth not by Escuage: And that he that holdeth by xx s. to the Guard of a Castle, holdeth by Socage.

Also there is a Maxim, that a Discent taketh away an Entry.

Also, that no Prescription in Lands maketh a Right.

Also, that a Prescription of Rent and Profits apprender out of Land maketh a Right.

Also, that the Limitation of a Prescription generally taken, is from the Time that no Man's Mind runneth to the contrary.

Also, that Assigns may be made upon Lands given in Fee, for Term of Life, or for Term of Years, though no mention be made of Assigns; and the same Law is of a Rent that is granted; but otherwise it is of a Warranty, and of a Covenant.

Also, that a Condition to avoid a Freehold, cannot be pleaded without Deed; but to avoid a Gift of Chattel, it may be pleaded without Deed.

Also, that a Release or Confirmation made by him that at the Time of the Release or Confirmation made, had no Right, is void in the Law, though a Right come to him after; except it be with Warranty, and then it shall bar him to all Right that he shall have after the Warranty made.

Also, that a Right or Title of Action that only dependeth in Action, cannot be given or granted to none other but only to the Tenant of the Ground, or to him that hath the Reversion or Remainder of the same Land.

Also, that in an Action of Debt upon a Contract, the Defendant may wage his Law: But otherwise it is upon a Lease of Lands for Term of Years, or at Will.

Also that if an Exigent, in Case of Felony, be awarded against a Man, he hath thereby forthwith forfeited his Goods to the King.

Also if the Son be attainted in the Life of the Father, and after he purchaseth his Charter of Pardon of the King, and after the Father dieth; in this Case the Land shall eschcat to the Lord of the Fee, insomuch that though he have a younger Brother, yet the Land shall not descend to him; for by the Attainder of the elder Brother the Blood is corrupt, and the Father in Law, died without Heir.

Also if an Abbot or Prior alien the Lands of his House, and dieth; in this Case, though his Successor have Right to the Lands, yet he may not

not enter, but he must take his Action that is appointed him by Law.

Also there is a Maxim in the Law, That if a Villein purchase Lands, and the Lord enter, he shall enjoy the Land as his Own: But if the Villein alien before the Lord enter, the Alienation is good. And the same Law is of Goods.

Also if a Man steal Goods to the Value of twelve Pence, or above, it is Felony, and he shall die for it. And if it be under the Value of xii Pence, then it is but Petit Larceny, and he shall not die for it, but shall be otherwise punished after the Discretion of the Judges, except it be taken from the Person; for if a Man take any Thing, how little soever it be, from a Man's Person, feloniously, it is called Robbery, and he shall die for it.

Also he that is arraigned upon an Indictment of Felony, shall be admitted in Favour of Life, to challenge xxxvi Jurors peremptorily; but if he challenge any above that Number, the Law taketh him as one that hath refused the Law, because he hath refused three whole Inquests, and therefore he shall die: But with Cause he may challenge as many as he hath Cause of challenge to. And farther, it is to be understood, that such peremptory Challenge shall not be admitted in Appeal, because it is at the Suit of the Party.

Also the Land of every Man is in the Law inclosed from other, though it lie in the open Field: And therefore if a Man do a Trespass therein, the Writ shall be, Quare clausum fregit.

Also the Rents, Commons of Pasture, of Tur-

Turbary, Reversions, Remainders, nor such other Things which lie not in manual Occupation, may not be given nor granted to none other without Writing.

Also, that he that recovereth Debt or Damages in the King's Courts, by such an Action wherein a Capias lay in the Process, may within a Year after the Recovery have a Capias ad satisfaciendum, to take the Body of the Defendant, and to commit him to Prison till he have paid the Debt and Damages: But if there lay no Capias in the first Action, then the Plaintiff shall have no Capias ad satisfaciendum, but must take a Fieri facias or an Elegit within the Year, or a Scire facias after the Year, or within the Year, if he will.

Also if a Release or Confirmation be made to him that, at the Time of the Release made, had nothing in the Land, &c. the Release or Confirmation is void, except in certain Cases, as to vouch, and certain other which need not here to be remembred.

Also there is a Maxim in the Law of England, that the King may disseise no Man, nor that no Man may disseise the King, ne pull any Reversion or Remainder out of him.

Also the King's Excellency is so high in the Law, that no Freehold may be given to the King, ne be derived from him, but by Matter of Record.

Also there was sometime a Maxim and a Law of England, that no Man should have a Writ of Right, but by special Suit to the King, and for a Fine to be made in the Chancery for it. But these Maxims be changed by the Statute of Magna Charta, cap. 16. where it is said thus, Nulli negabimus,

negabimus, nulli vendemus rectum vel justitiam. And by the Words Nulli negabimus, a Man shall have a Writ of Right of Course in the Chancery without suing to the King for it: And by the Words Nulli vendemus, he shall have it without Fine. And so many Times the old Maxims of the Law be changed by Statutes. Also though it be reasonable, that for the manifold Diversities of Actions that be in the Laws of England, there should be Diversities of Process, as in the real Actions after one Manner, and in personal Actions after another Manner; yet it cannot be proved meerly by Reason, that the same Process ought to be had, and none other: For by Statute it might be altered. And so the Ground of the said Process is to be referred only to the Maxims and Customs of the Realm.

And I have shewed thee these Maxims before rehearsed, not to the Intent to shew thee specially what is the Cause of the Law in them, for that would ask a great Respite: But I have shewed them only to the Intent that thou mayest perceive that the said Maxims and other like may be conveniently set for one of the Grounds of the Laws of England. Moreover there be divers Cases whereof I am in Doubt whether they be only Maxims of the Law, or that they be grounded upon the Law of Reason; wherein I pray thee let me hear thine Opinion.

Doct. I pray thee shew those Cases that thou meanest; and I shall make thee answer therein as I shall see cause.

CHAP.

CHAP. IX.

Hereafter follow divers Cases wherein the Student doubteth whether they be only Maxims of the Law, or that they be grounded upon the Law of Reason.

THE Law of England is, that if a Man command another to do a Trespass, and he doth it, that the Commander is a Trespasser. And I am in Doubt, whether that it be only by a Maxim of the Law, or that it be by the Law of Reason.

Also, I am in Doubt upon what Law it is grounded, that the Accessory shall not be put to answer before the Principal, &c.

Also the Law is, that if an Abbot buy a Thing that cometh to the Use of the House, and dieth, that his Successor shall be charged. And I am somewhat in Doubt upon what ground that Law dependeth.

Also, that he that hath Possession of Land, though it be by Disseisin, hath Right against all Men but against him that hath Right.

Also, that if an Action real be sued against any Man that hath nothing in the Thing demanded, the Writ shall abate at the Common Law.

Also, That by the Alienation of the Tenant hanging the Writ, or his Entry into Religion, or if he be made a Knight, or if she be a Woman and take an Husband hanging the Writ, that the Writ shall not abate.

Also,

Also, if Land, and Rent that is going out of the same Land, come into one Man's Hand of like Estate, and like Surety of Title, the Rent is extinct.

Also, if Land descend to him that hath Right to the same Land before, he shall be remitted to his better Title, if he will.

Also, if two Titles be concurrent together, that the eldest Title shall be preferred.

Also, that every Man is bound to make Recompence for such Hurt as his Beasts shall do in the Corn or Grass of his Neighbour, though he know not that they were there.

Also, if the Demandant or Plaintiff, hanging his Writ, will enter into the Thing demanded, his Writ shall abate. And it is many Times very hard and of great Difficulty, to know what Cases of the Law of England be grounded upon the Law of Reason, and what upon Custom of the Realm; and though it be hard to discuss it, it is very necessary to be known, for the Knowledge of the perfect Reason of the Law. And if any Man think that these Cases before rehearsed be grounded upon the Law of Reason, then he may refer them to the first Ground of the Law of England, which is the Law of Reason, whereof is made mention in the fifth Chapter. And if any Man think that they be grounded upon the Law of Custom, then he may refer them to the Maxims of the Law, which be assigned for the fourth Ground of the Law of England, whereof mention is made in the eighth Chapter, as before appeareth.

Doct. But I pray thee shew me by what Authority it is proved in the Laws of England, that

that the Cases which thou hast put before in the eighth Chapter, and such other which thou callest Maxims, ought not to be denied, but ought to be taken as Maxims. For sith they cannot be proved by Reason, as thou agreest thy self they cannot, they may as lightly be denied as affirmed, unless there be some sufficient Authority to approve them.

Stud. Many of the Customs and Maxims of the Laws of England be known by the Use and the Custom of the Realm so apparently, that it needeth not to have any Law written thereof. For what needeth it to have any Law written that the eldest Son shall inherit his Father, or that all the Daughters shall inherit together as one Heir, if there be no Son; or that the Husband shall have the Goods and Chattels of his Wife that she hath at the Time of the Espousals, or after; or that a Bastard shall not inherit as Heir; or the Executors shall have the Disposition of all the Goods of their Testator; and if there be no Executors, that the Ordinary shall have it, and the Heir shall not meddle with the Goods of his Ancestor, but if any particular Customs help him?

The other Maxims and Customs of the Law, that be not so openly known among the People, may be known partly by the Law of Reason, and partly by the Books of the Laws of England called Years and Terms, and partly by divers Records remaining in the King's Courts, and in the Treasury, and specially by a Book called the Register, and also by divers Statutes wherein many of the said Customs and Maxims

be

be oft recited, as to a diligent Searcher will evidently appear.

CHAP. X.

Of the fifth Ground of the Law of *England*.

THE fifth Ground of the Law of England standeth in divers particular Customs used in divers Counties, Towns, Cities and Lordships in this Realm: The which particular Customs, because they be not against the Law of Reason, nor the Law of God, though they be against the said general Customs or Maxims of the Law, yet nevertheless they stand in effect, and be taken for Law: But if it rise in question in the King's Courts, whether there be any such particular Custom, or not, it shall be tried by twelve Men, and not by the Judges, except the same particular Custom be of Record in the same Court. Of which particular Customs I have hereafter noted some for an example.

First, there is a Custom in Kent that is called Gavelkind, that all the Brethren shall inherit together, as Sisters at the Common Law.

Also there is another particular Custom that is called Burgh English, where the younger Son shall inherit before the eldest; and that Custom is in Nottingham.

Also there is a Custom in the City of London, that Freemen there may by their Testament inrolled, bequeath their Lands that they be seised of to whom they will, except to Mortmain; and if they be Citizens and Freemen, that

that they may also bequeath their Lands to Mortmain.

Also in Gavelkind, though the Father be hanged the Son shall inherit. For their Custom is, The Father to the Bough, the Son to the Plough.

Also in some Countries the Wife shall have the half of the Husband's Land in the Name of her Dowry, as long as she liveth sole.

And in some Country the Husband shall have the half of the Inheritance of his Wife, though he have no Issue by her.

Also in some Country an Infant when he is of the Age of fifteen Years may make a Feoffment, and the Feoffment good: And in some Country, when he can mete an Ell of Cloth.

CHAP. XI.

Of the sixth Ground of the Law of *England*.

THE sixth Ground of the Law of England standeth in divers Statutes made by our Sovereign Lord the King and his Progenitors, and by the Lords Spiritual and Temporal, and the Commons in divers Parliaments, in such Cases where the Law of Reason, the Law of God, Customs, Maxims, ne other Grounds of the Law seemed not to be sufficient to punish evil Men, and to reward good Men. And I remember not that I have seen any other Grounds of the Law of England, but only these that I have before remembred. Furthermore it appeareth of that I have said before, that oft-times two or three Grounds of the Law of England must be joined together, or that the Plaintiff

tiff can open and declare his Right, as it may appear by this Example. If a Man enter into another Man's Land by Force, and after make Feoffment for Maintenance to defraud the Plaintiff from his Action; in this Case it appeareth that the said unlawful Entry is prohibited by the Law of Reason: But the Plaintiff shall recover treble Damages, that is by Reason of the Statute made in the 8th Year of King H. 6. cap. 9. And that the Damages shall be cessed by twelve Men, that is by the Custom of the Realm. And so in this Case three Grounds of the Law of England maintain the Plaintiff's Action.

And so it is in divers other Cases that need not to be remembred now. And thus I make an End for this Time to speak any farther of the Grounds of the Law of England.

Doct. I thank thee for the great Pain that thou hast taken therein. Nevertheless, forasmuch as it appeareth that thou hast said before, that the learned Men of the Law of England pretend to verify that the Law of England will nothing do, ne attempt against the Law of Reason, nor the Law of God, I pray thee answer me to some Questions grounded upon the Law of England, how, as thou thinkest, the Law may stand with Reason or Conscience in them.

Stud. Put the Case, and I shall make answer therein as well as I can.

CHAP.

CHAP. XII.

The first Question of the Doctor, of the Law of *England* and Conscience.

I Have heard say, that if a Man that is bound in an Obligation pay the Money, but he taketh no Acquittance, or if he take one, and it happeneth him to leese it, that in that case, he shall be compelled by the Laws of England to pay the Money again. And how may it be said then that that Law standeth with Reason and Conscience? For as it is grounded upon the Law of Reason that Debts ought of Right to be payed; so it is grounded upon the Law of Reason (as it seemeth) that when they be payed, that he that payed them should be discharged.

Stud. First, thou must understand, that it is not the Law of England, that if a Man that is bound in an Obligation pay the Money without Acquittance, or if he take Acquittance and leese it, that therefore the Law determineth that he ought of Right to pay the Money eftsoons, for that Law were both against Reason and Conscience. But though it is so, that there is a general Maxim in the Law of England, that in an Action of Debt sued upon an Obligation the Defendant shall not plead that he oweth not the Money, ne can in no wise discharge himself in that Action, but he have Acquittance or some other Writing sufficient in the Law, or some other Thing like, witnessing that he hath paid the Money; that

that is ordained by the Law to avoid a great Inconvenience that else might happen to come to many People; that is to say, that every Man by a nude Parol and by a bare Averment should avoid an Obligation. Wherefore to avoid that Inconvenience, the Law hath ordained, that as the Defendant is charged by a sufficient Writing, that so he must be discharged by sufficient Writing, or by some other Thing of as high Authority as the Obligation is. And though it may follow thereupon, that in some particular Case, a Man by Occasion of that general Maxim may be compelled to pay the Money again that he payed before; yet neverthelefs no Default can be thereof assigned in the Law. For like as Makers of Law take heed to such Things as may oft fall, and do much hurt among the People, rather than to particular Cases: So in like wise the general Grounds of the Law of England heed more what is good for many, than what is good for one singular Person only. And because it should be a Hurt to many, if an Obligation should be so lightly avoided by Word; therefore the Law especially preventeth that Hurt under such Manner as before appeareth; and yet intendeth not, nor commandeth not, that the Money of Right ought to be paid again, but setteth a general Rule which is good and necessary to all the People, and that every Man may well keep, without it be through his own Default. And if such Default happen in any Person, whereby he is without Remedy at the Common Law, yet he may be holpen by a Subpœna; and so he may in

in many other Cases where Conscience serveth for him, that were too long to rehearse now.

Doct. But I pray thee shew me under what Manner a Man may be holpen by Conscience; and whether he shall be holpen in the same Court, or in another.

Stud. Because it cannot be well declared where a Man shall be holpen by Conscience, and where not, but it be first known what Conscience is; therefore because it pertaineth to thee most properly to treat of the Nature and Quality of Conscience, therefore I pray thee that thou wilt make me some brief Declaration of the Nature and Quality of Conscience, and then I shall answer to thy Question as well as I can.

Doct. I will with good Will do as thou sayest: And to the Intent that thou mayest the better understand that I shall say of Conscience, I shall first shew thee what Sinderesis is, and then what Reason is, and then what Conscience is; and how these three differ among themselves, I shall somewhat touch.

CHAP. XIII.

What *Sinderesis* is.

Sinderesis is a natural Power of the Soul, set in the highest Part thereof, moving and stirring it to Good, and abhorring Evil. And therefore Sinderesis never sinneth nor erreth. And this Sinderesis our Lord put in Man, to the Intent that the Order of Things should be observed. For, after St. Dionyse, the Wisdom of

God joined the Beginning of the second Things to the last of the first Things: For Angel is of a Nature to understand without searching of Reason, and to that Nature Man is joined by Sinderesis, the which Sinderesis may not wholly be extincted neither in Man, ne yet in damned Souls. But nevertheless, as to the Use and Exercise thereof, it may be let for a Time, either through the Darkness of Ignorance, or for undiscreet Delectation, or for the Hardness of Obstinacy. First by the Darkness of Ignorance, Sinderesis may be let that it shall not murmur against Evil, because he believeth Evil to be Good: As it is in Hereticks, the which, when they die for the Wickedness of their Error, believe they die for the very Truth of their Faith. And by undiscreet Delectation Sinderesis is sometime so overlaid, that Remorse or Grudge of Conscience for that Time can have no Place. For the Hardness of Obstinacy Sinderesis is also let that it may not stir to Goodness, as it is in damned Souls, that be so obstinate in Evil, that they may never be inclined to Good. And though Sinderesis may be said to that point extinct in damned Souls, yet it may not be said that it is fully extinct to all Intents. For they alway murmur against the Evil of the Pain that they suffer for Sin, and so it may not be said that it is universally, and to all Intents, and to all Times extinct. And this Sinderesis is the Beginning of all Things that may be learned by Speculation or Study, and ministreth the general Grounds and Principles thereof; and also of all Things that are to be done by Man. An example of such Things as may be learned by

by Speculation appeareth thus: Sinderesis saith that every whole Thing is more than any one Part of the same Thing, and that is a sure Ground that never faileth. And an example of Things that are to be done, or not to be done: As where Sinderesis saith no Evil is to be done, but that Goodness is to be done and followed, and Evil to be fled, and such other.

And therefore Sinderesis is called by some Men the Law of Reason, for it ministreth the Principles of the Law of Reason, the which be in every Man by Nature, in that he is a reasonable Creature.

CHAP. XIV.

Of Reason.

WHEN the first Man Adam was created, he received of GOD a double Eye, that is to say, an outward Eye, whereby he might see visible Things, and know his bodily Enemies, and eschew them; and an inward Eye, that is, the Eye of Reason, whereby he might see his spiritual Enemies that fight against his Soul, and beware of them. And among all Gifts that God gave to Man, this Gift of Reason is the most noblest, for thereby Man precelleth all Beasts, and is made like to the Dignity of Angels, discerning Truth from Falshood, and Evil from Good; wherefore he goeth far from the Effect that he was made to, when he taketh not heed to the Truth, or when he preferreth Evil before Good.

And therefore, after Doctors, Reason is the Power

Power of the Soul that discerneth between good and evil, and between good and better, comparing the one with the other: The which also sheweth Vertues, loveth Good, and flieth Vices. And Reason is called righteous and good, for it is conformable to the Will of God; and that is the first Thing and the first Rule that all Things must be ruled by. And Reason that is not righteous nor straight, but that is said culpable, is either because she is deceived with an Error that might be overcome, or else through her Pride or Slothfulness she enquireth not for Knowledge of the Truth that ought to be enquired. Also Reason is divided into two Parts, that is to say, into the higher Part, and into the lower Part.

The higher Part hideth heavenly Things and eternal, and reasoneth by heavenly Laws or by heavenly Reason, what is to be done, and what is not to be done, and what Things God commandeth, and what he prohibiteth. And this higher Part of Reason hath no regard to transitory Things or temporal Things, but that sometime as it were by Manner of Counsel, she bringeth forth heavenly Reasons to order well temporal Things. The lower Part of Reason worketh most to govern well temporal Things, and she groundeth her Reasons much upon Laws of Man, and upon Reason of Man, whereby she concludeth that that is to be done that is honest and expedient to the Commonwealth, or not to be done, that is not expedient to the Commonwealth. And so that Reason whereby I know God, and such Things as pertain to God, belong-

geth to the highest Part of Reason; and the Reason whereby I know Creatures belongeth to the lower Part of Reason. And though these two Parts, that is to say, the higher Part and the lower Part, be one in Deed and Essence, yet they differ by Reason of their Working, and of their Office; as it is of one self Eye, that sometime looketh upward, and sometime downward.

CHAP. XV.

¶ Of Conscience.

THIS word Conscience, which in Latin is called Conscientia, is compounded of this Preposition cum, that is to say in English, with; and of this Noun Scientia, that is to say in English, Knowledge: And so Conscience is as much to say as Knowledge of one Thing with another Thing; and Conscience so taken, is nothing else but an applying of any Science or Knowledge to some particular Act of Man. And so Conscience may sometime err, and sometime not err. And of Conscience thus taken, Doctors make many Descriptions. Whereof one Doctor saith, that Conscience is the Law of our Understanding. Another, that Conscience is an Habit of the Mind discerning between good and evil. Another, that Conscience is the Judgment of Reason judging on the particular Acts of Man. All which sayings agree in one Effect, (that is to say) that Conscience is an actual applying of any Cunning or Knowledge to such Things as are to be done: Whereupon

upon it followeth, that upon the most perfect Knowledge of any Law or Cunning, and of the most perfect and most true applying of the same to any particular Act of Man, followeth the most perfect, the most pure, and the most best Conscience. And if there be Default in knowing of the Truth of such a Law, or in the applying of the same to particular Acts, then thereupon followeth an Error or Default in Conscience. As it may appear by this Example: Sinderesis ministreth an universal Principle that never erreth, (that is to say) that an unlawful Thing is not to be done. And then it might be taken by some Men, that every Oath is unlawful, because the Lord saith, Mat. 5. Ye shall in no wise swear; and yet he that by Reason of the said Words will hold that it is not lawful in no Case to swear, erreth in Conscience; for he hath not the perfect Knowledge and Understanding of the Truth of the said Gospel, nor he reduceth not the saying of the Scripture to other Scriptures, in which it is granted that in some Case an Oath may be lawful. And the Cause why Conscience may so err in the said Case, and in other like, is because Conscience is formed of a certain Proposition or Question grounded particularly upon universal Rules ordained for such Things as are to be done. And because a particular Proposition is not known to himself, but must appear and be searched by a diligent Search of Reason, therefore in Search and in the Conscience that should be formed thereupon may happen to be Error, and thereupon it is said that there is Error in Conscience: Which Error cometh either because he

 doth

doth not assent to that he ought to assent unto, or else because his Reason whereby he doth refer one Thing to another is deceived. For farther Declaration whereof it is to understand, that Error in Conscience cometh seven manner of Ways. First, through Ignorance; and that is, when Man knoweth not what he ought to do: And then he ought to ask Counsel of them that he thinks most expert in that Science whereupon his Doubt riseth. And if he can have no Counsel, then he must wholly commit him to God, and he of his Goodness will so order him, that he will save him from Offence. The second is through Negligence; as when a Man is negligent to search his own Conscience, or to enquire the Truth of other. The third is through Pride; as when he will not meeken himself, ne believe them that be better and wiser than he is. The fourth is through Singularity; as when a Man followeth his own Wit, and will not conform himself to other, nor follow the good common Ways of Men. The fifth is through an inordinate Affection to himself, whereby he maketh Conscience to follow his Desire, and so he causeth her to go out of her right Course. The sixth is through Pusillanimity, whereby some Person dreadeth oft-times such Things as of reason he ought not to dread. The seventh is through Perplexity; and this is when a Man believeth himself to be so set betwixt two Sins, that he thinketh it unpossible but that he shall fall into the one: But a Man can never be so perplexed indeed, but through an Error in Conscience; and if he will put away that Error,

ror, he shall be delivered. Therefore I pray thee that thou wilt always have a good Conscience; and if thou have so, thou shalt always be merry; and if thine own Heart reprove thee not, thou shalt always have inward Peace. The Gladness of right wise Men, is of God, and in God, and their Joy is always in Truth and Goodness. There be many Diversities of Conscience, but there is none better than that whereby a Man truly knoweth himself. Many Men know many great and high cunning Things, and yet know not themselves: And truly he that knoweth not himself, knoweth nothing well. Also he hath a good and clean Conscience, that hath purity and cleanness in his Heart, Truth in his Word, and right Wiseness in his Deed. And as a Light is set in a Lantern, that all that is in the House may be seen thereby; so Almighty God hath set Conscience in the midst of every reasonable Soul, as a Light whereby he may discern and know what he ought to do, and what he ought not to do. Therefore forasmuch as it behoveth thee to be occupied in such Things as pertain to the Law; it is necessary that thou ever hold a pure and clean Conscience, specially in such Things as concern Restitution: For the Sin is not forgiven, but if the Thing that is wrongfully taken be restored. And I counsel thee also that thou love that is good, and fly that is evil; and that thou do to another, as thou wouldest should be done to thee, and that thou do nothing to other, that thou wouldest not should be done to thee, that thou do nothing against Truth, that thou live peaceably with

thy Neighbour, and that thou do Justice to every Man as much as in thee is: And also that in every general Rule of the Law thou do observe and keep Equity. And if thou do thus, I trust the Light of the Lantern, that is, thy Conscience, shall never be extincted.

Stud. But, I pray thee, shew me what is that Equity that thou hast spoken of before, and that thou wouldest that I should keep.

Doct. I will with good-will shew thee somewhat thereof.

CHAP. XVI.

¶ What is *Equity*?

EQuity is a right Wiseness that considereth all the particular Circumstances of the Deed; the which also is tempered with the Sweetness of Mercy. And such an Equity must always be observed in every Law of Man, and in every general Rule thereof: And that knew he well that said thus, Laws covet to be ruled by Equity. And the Wise Man saith, Be not overmuch right Wise; for the extreme right Wiseness is extreme Wrong: As who saith, If thou take all that the Words of the Law giveth thee, thou shalt sometime do against the Law. And for the plainer Declaration what Equity is, thou shalt understand, that sith the Deeds and Acts of Men, for which Laws have been ordained, happen in divers Manners infinitely, it is not possible to make any general Rule of the Law, but that it shall fail in some Case: And therefore Makers of Laws take heed to such Things as

as may often come, and not to every particular Case, for they could not though they would. And therefore to follow the Words of the Law were in some Case both against Justice and the Commonwealth. Wherefore in some Cases it is necessary to leave the Words of the Law, and to follow that Reason and Justice requireth, and to that Intent Equity is ordained; that is to say, to temper and mitigate the Rigor of the Law. And it is called also by some Men Epicikeia; the which is no other Thing but an Exception of the Law of God, or of the Law of Reason, from the general Rules of the Law of Man, when they by Reason of their Generality would in any particular Case judge against the Law of God or the Law of Reason: The which Exception is secretly understood in every general Rule of every positive Law. And so it appeareth that Equity taketh not away the very Right, but only that that seemeth to be right by the general Words of the Law: Nor it is not ordained against the Cruelness of the Law, for the Law in such Case generally taken is good in himself; but Equity followeth the Law in all particular Cases where Right and Justice requireth, notwithstanding the general Rule of the Law be to the contrary. Wherefore it appeareth that if any Law were made by a Man without any such Exception expressed or implied, it were manifestly unreasonable, and were not to be suffered: For such Causes might come, that he that would observe the Law, should break both the Law of God and the Law of Reason. As if a Man make a Vow that he will never eat White-meat, and

after it happeneth him to come there where he can get no other meat; in this Case it behoveth him to break his Avow, for the particular Case is excepted secretly from his general Avow by his Equity or Epieikeia, as it is said before. Also if a Law were made in a City that no Man under the Pain of Death should open the Gates of the City before the Sun-rising: Yet if the Citizens before that Hour flying from their Enemies, come to the Gates of the City, and one for saving of the Citizens openeth the Gates before the Hour appointed by the Law, he offendeth not the Law, for that Case is excepted from the said general Law by Equity, as is said before. And so it appeareth that Equity rather followeth the Intent of the Law, than the Words of the Law. And I suppose that there be in like wise some like Equities grounded on the general Rules of the Law of the Realm.

Stud. Yea verily; whereof one is this. There is a general Prohibition in the Laws of England, that it shall not be lawful to any Man to enter into the Freehold of another without Authority of the Owner or the Law: But yet it is excepted from the said Prohibition by the Law of Reason, that if a Man drive Beasts by the Highway, and the Beasts happen to escape into the Corn of his Neighbour, and he, to bring out his Beasts, that they should do no Hurt, goeth into the Ground, and fetteth out his Beasts, there he shall justify that Entry into the Ground by the Law. Also notwithstanding the Statute of Edw. 3. made the 14th Year of his Reign, whereby it is ordained, that

no

no Man upon Pain of Imprisonment, should give any Alms to any valiant Beggar, that is well able to labour; yet if a Man meet with a valiant Beggar in so cold a Weather, and so light Apparel, that if he have no Cloaths he shall not be able to come to any Town for Succour, but is likely rather to die by the Way, and he therefore giveth him Apparel to save his Life, he shall be excused by the said Statute, by such an Exception of the Law of Reason as I have spoken of.

Doct. I know well that, as thou sayest, he shall be excepted of the said Statute by Conscience, and over that, that he shall have great Reward of God for his good Deeds: But I would wit whether the Party shall be so discharged in the Common Law by such an Exception of the Law of Reason, or not? For though Ignorance unvincible of a Statute excuse the Party against God, yet (as I have heard) it excuseth not in the Laws of the Realm, ne yet Chancery, as some say, although the Case be so that the Party to whom the Forfeiture is given may not with Conscience leave it.

Stud. Verily, by thy Question thou hast put me in a great Doubt; wherefore I pray thee give me a respite therein to make thee an Answer: But, as I suppose for the Time, (howbeit I will not fully affirm it to be as I say) it should seem that he should well plead it for his Discharge at the Common Law, because it shall be taken that it was the Intent of the Makers of the Statute to except such Cases. And the Judges may many Times judge after the Mind of the Makers as far as the Letter may

suffer, and so it seemeth they may in this Case. And divers other Exceptions there be also from other general Grounds of the Law of the Realm by such Equity as thou hast remembred before, that were too long to rehearse now.

Doct. But yet I pray thee shew me shortly somewhat more of thy Mind, under what manner a Man may be holpen in this Realm by such Equity.

Stud. I will with good will shew thee somewhat therein.

CHAP. XVII.

¶ In what Manner a Man shall be holpen by Equity in the Laws of *England*.

FIrst, it is to be understood, there be in many Cases divers Exceptions from the general Grounds of the Law of the Realm by other reasonable Grounds of the same Law, whereby a Man shall be holpen in the Common Law. As it is of this general Ground, that it is not lawful for any Man to enter upon a Descent; yet the Reasonableness of the Law excepteth from that Ground an Infant that hath Right, and hath suffered such a Descent, and him also that maketh continual Claim, and suffereth them to enter, notwithstanding the Descent. And of that Exception they shall have Advantage in the Common Law. And so it is likewise of divers Statutes: As of the Statute whereby it is prohibited that certain particular Tenants shall do no Waste, yet if a Lease for Term of Years be made to an Infant that is within

within Years of Discretion, as of the Age of v. or vj. Years, and a Stranger do Waste, in this Case this Infant shall not be punished for the Waste, for he is excepted and excused by the Law of Reason. And a Woman covert, to whom such a Lease is made after the Coverture, shall be also discharged of Waste after her Husband's Death, by a reasonable Maxim and Custom of the Realm. And also for Reparations to be made upon the same Ground, it is lawful for such particular Tenants to cut down Trees upon the same Ground to make Reparations. But the Cause there, as I suppose, is, for that the Mind of the Makers of the said Statute shall be taken to be, that that Case should be excepted. And in all these Cases the Parties shall be holpen in the same Court, and by the Common Law. And thus it appeareth, that sometime a Man may be excepted from the Rigor of a Maxim of the Law by another Maxim of the Law; and sometime from the Rigor of a Statute by the Law of Reason, and sometime by the Intent of the Makers of the Statute. But yet it is to be understood, that most commonly where any Thing is excepted from the general Customs or Maxims of the Laws of the Realm by the Law of Reason, the Party must have his Remedy by a Writ that is called Subpœna, if a Subpœna lie in the Case. But where a Subpœna lieth, and where not, it is not our Intent to treat of at this Time. And in some Cases there is no Remedy for such an Equity by Way of Compulsion, but all Remedy therein must be committed to the Conscience of the Party.

Doct.

Doct. But in Case where a Subpœna lieth, to whom shall it be directed, whether to the Judge or the Party?

Stud. It shall never be directed to the Judge, but to the Party Plaintiff, or to his Attorney; and thereupon an Injunction commanding them by the same, under a certain Pain therein to be contained, that he proceed no farther at the Common Law, till it be determined in the King's Chancery, whether the Plaintiff hath Title in Conscience to recover, or not: And when the Plaintiff, by Reason of such an Injunction, ceaseth to ask any farther Process, the Judges will in like wise cease to make any farther Process in that Behalf.

Doct. Is there any mention made in the Law of England of any such Equities?

Stud. Of this Term Equity, to the Intent that is spoken of here, there is no mention made in the Law of England: But of an Equity derived upon certain Statutes mention is made many Times and often in the Law of England; but that Equity is all of another Effect than this. But of the Effect of this Equity that we now speak of, mention is made many Times: For it is oft-times argued in the Law of England, where a Subpœna lieth, and where not, and daily Bills be made by Men learned in the Law of this Realm to have Subpœna's. And it is not prohibited by the Law, but that they may well do it, so that they make them not but in Case where they ought to be made, and not for Vexation of the Party, but according to the Truth of the Matter. And the Law will in many Cases, that there

there shall be such Remedy in the Chancery upon divers Things grounded upon such Equities, and then the Lord Chancellor must order his Conscience after the Rules and Grounds of the Law of the Realm; insomuch that it had not been inconvenient to have assigned such Remedy in the Chancery upon such Equities for the seventh Ground of the Law of England. But forasmuch as no Record remaineth in the King's Court of no such Bill, ne of the Writ of Subpœna or Injunction that is used thereupon; therefore it is not set as for a special Ground of the Law, but as a Thing that is suffered by the Law.

Doct. Then sith the Parties ought of Right in many Cases to be holpen in the Chancery upon such Equities; it seemeth that if it were ordained by Statute, that there should be no Remedy upon such Equities in the Chancery, nor in none other Place, but that every matter should be ordained only by the Rules and Grounds of the Common Law, that the Statute were against Right and Conscience.

Stud. I think the same: But I suppose there is no such Statute.

Doct. There is a Statute of that Effect, as I have heard say, wherein I would gladly hear thy Opinion.

Stud. Shew me that Statute, and I shall with good will say as me thinketh therein.

CHAP. XVIII.

¶ Whether the Statute hereafter rehearsed by the Doctor be against Conscience, or not.

There is a Statute made the 4th Year of King H. 4. c. 22. wherby it is enacted, that Judgment given by the King's Courts shall not be examined in the Chancery, Parliament, nor elsewhere; by which Statute it appeareth, that if any Judgment be given in the King's Courts against an Equity or against any Matter of Conscience, that there can be had no Remedy by that Equity, for the Judgment cannot be reformed without Examination, and the Examination is by the said Statute prohibited: Wherefore it seemeth that the said Statute is against Conscience. What is thine Opinion therein?

Stud. If Judgment given in the King's Courts should be examined in the Chancery before the King's Counsel or any other Place, the Plaintiffs or Demandants should seldom come to the Effect of their Suit, ne the Law should never have End. And therefore to eschew that Inconvenience that Statute was made. And though peradventure by Reason of that Statute some singular Person may happen to have Loss; nevertheless the said Statute is very necessary, to eschew many great Vexations and unjust Expences that would else come to many Plaintiffs that have right wisely recovered in the King's Courts. And it is much more provided for in the Law of England, that Hurt nor Damages should not come to many, than only to one. And also the said Statute

tute doth not prohibit Equity, but it prohibiteth only the Examination of the Judgment, for the eschewing of the Inconvenience before rehearsed. And it seemeth that the said Statute standeth with good Conscience. And in many other Cases, where a Man doth wrong, yet he shall not be compelled by Way of Compulsion to reform it; for many Times it must be left to the Conscience of the Party, whether he shall redress it or not. And in such Case he is in Conscience as well bound to redress it, if he will save his Soul, as he were if he were compellable thereto by the Law; as it may appear in divers Cases that may be put upon the same Ground.

Doct. I pray thee put some of these Cases for an Example.

Stud. If the Defendant wage his Law in an Action of Debt brought upon a true Debt, the Plaintiff hath no means to come to his Debt by Way of Compulsion, neither by Subpœna, nor otherwise; and yet the Defendant is bound in Conscience to pay him. Also if the Grand Jury in Attaint affirm a false Verdict given by the Petty Jury, there is no farther Remedy but the Conscience of the Party. Also where there can be had no sufficient Proof, there can be no Remedy in the Chancery, no more than there may be in the Spiritual Court. And because thou hast given an Occasion to speak of Conscience, I would gladly hear thy Opinion, where Conscience shall be ruled after the Law, and where the Law shall be ruled after Conscience.

Doct.

Doct. And of that Matter I would likewise gladly hear thy Opinion, specially in Cases grounded upon the Laws of England, for I have not heard but little thereof in Time past: But before thou put any Case thereof, I would that thou wouldest shew me how these two Questions after thy Opinion are to be understood.

CHAP. XIX.

Of what Law this Question is to be understood, that is to say, where Conscience shall be ruled after the Law.

THE Law whereof mention is made in this Question, that is to say, where Conscience shall be ruled by the Law, is not, as me seemeth, to be understood only of the Law of Reason and of the Law of God, but also of the Law of Man, that is not contrary to the Law of Reason, nor the Law of God, but it is superadded unto them for the better ordering of the Commonwealth: For such a Law of Man is always to be set as a Rule in Conscience, so that it is not lawful for a Man to frame it on the one Side, ne on the other: For such a Law of Man hath not only the Strength of Man's Law, but also the Law of Reason, or of the Law of God, whereof it is derived: For Laws made by Men, which have received of God Power to make Laws, be made by God. And therefore Conscience must be ordered by the Law, as it must be upon the

the Law of God, and upon the Law of Reason. And furthermore, the Law whereof mention is made in the latter End of the Chapter next before, that is to say, in the Question wherein it is asked where the Law is to be left and forsaken for Conscience, is not to be understood of the Law of Reason, nor of the Law of God; for those two Laws may not be left. Nor it is not to be understood of the Law of Man that is made in particular Cases, and that is consonant to the Law of Reason, and to the Law of God, that yet that Law should be left for Conscience: For of such a Law made by Man, Conscience must be ruled, as it is said before. Nor it is not to be understood of a Law made by a Man commanding or prohibiting any Thing to be done that is against the Law of Reason or the Law of God. For if any Law made by him, bind any Person to any Thing that is against the said Laws, it is no Law, but a Corruption, and manifest Error. Therefore, after them that be learned in the Laws of England, the said Question, that is to say, where the Law is to be left for Conscience, and where not, is to be understood in divers Manners, and after divers Rules, as hereafter shall somewhat be touched.

First, many unlearned Persons believe that it is lawful for them to do with good Conscience all Things, which if they do them, they shall not be punished therefore by the Law, though the Law doth not warrant them to do that they do, but only, when it is done, doth not for some reasonable Consideration,

ration punish them that do it, but leaveth it only to his Conscience. And therefore many Persons do oft-times that they should not, and keep as their own that that in Conscience they ought to restore. Wherefore there is the Laws of England in this Case.

If two Men have a Wood jointly, and the one of them selleth the Wood, and keepeth all the Money wholly to himself; in this Case his Fellow shall have no Remedy against him by Law; for as they, when they took the Wood jointly, put each other in Trust, and were content to occupy together: So the Law suffereth them to order the Profits thereof according to the Trust that each of them put the other in. And yet if one took all the Profits, he is bound in Conscience to restore the Half to his Fellow: For, as the Law giveth him Right only to half the Land, so it giveth him Right only in Conscience to the half Profits. And yet nevertheless it cannot be said in that Case, that the Law is against Conscience; for the Law never willeth, ne commandeth that one should take all the Profits, but leaveth it to their Conscience; so that no Default can be found in the Law, but in him that taketh all the Profits to himself may be assigned Default, who is bound in Conscience to reform it, if he will save his Soul, though he cannot be compelled thereto by the Law. And therefore in this Case and other like, that Opinion which some have, that they may do with Conscience all that they shall not be punished for by the Law if they do it, it is to be left for Conscience; but the Law is not to be left for Conscience.

Also

Also many Men think, that if a Man have Land that another hath Title to, if he that hath the Right shall not, by the Action that is given him by the Law to recover his Right by, recover Damages, that then he that hath the Land is also discharged of Damages in Conscience; and that is a great Error in Conscience; for though he cannot be compelled to yield the Damages by no Man's Law, yet he is compelled thereto by the Law of Reason, and by the Law of God, whereby we be bound to do as we would be done to, and that we should not covet our Neighbour's Goods. And therefore if Tenant in Tail be disseised, and the Disseisor dieth seised, and then the Heir in the Tail bringeth a Formedon, and recovereth the Land, and no Damages, for the Law giveth him no Damage in that Case; yet the Tenant by Conscience is bound to yield Damages to the Heir in Tail from the Death of his Ancestor. Also it is taken by some Men, that the Law must be left for Conscience, where the Law doth not suffer a Man to deny that he hath before affirmed in Court of Record, or for that he hath wilfully excluded himself thereof for some other Cause: As if the Daughter that is only Heir to her Father will sue Livery with her Sister that is a Bastard, in that Case she shall not after be received to say that her Sister is a Bastard; insomuch that if her Sister take Half the Land with her, there is no Remedy against her by the Law. And no more there is of Diversity in other Estopples, which were too long to rehearse now. And yet the Party that may take Advantage by such an Estopple, by-

by the Law, is bound in Conscience to forsake that Advantage, especially if he were so estopped by Ignorance, and not by his own Knowledge and Assent. For though the Law in such Cases giveth no Remedy to him that is estopped, yet the Law judgeth not that the other hath Right unto the Thing that is in Variance betwixt them.

And it is to be understood, that the Law is to be left for Conscience, where a Thing is tried and found by Verdict against the Truth; for in the Common Law the Judgment must be given according as it is pleaded and tried, like as it is in other Laws, that the Judgment must be given according to that that is pleaded and proved. And it is to be understood, that the Law is to be left for Conscience, where the Cause of the Law doth cease: For when the Cause of the Law doth cease, the Law also doth cease in Conscience, as appeareth by this Case hereafter following.

A Man maketh a Lease for Term of Life, and after a Stranger doth Waste; wherefore the Lessee bringeth an Action of Trespass, and hath Judgment to recover Damages, having regard to the treble Damages that he shall yield to him in the Reversion: And after he in the Reversion, before Action of Waste sued, dieth, so that the Action of Waste is thereby extincted: Then the Tenant for Term of Life, though he may sue Execution of the said Judgment by the Law, yet he may not do it by Conscience; for in Conscience he may take no more than he is hurted by the said Trespass, because he is not charged over with treble Damages to

to his Leſſor. Alſo it is to be underſtood, where a Law is grounded upon a Preſumption, if the Preſumption be untrue, then the Law is not to be holden in Conſcience. And now I have ſhewed thee ſomewhat of the Queſtion, that is to ſay, where the Law ſhall be ruled after Conſcience, I pray thee ſhew me whether there be not like Diverſities in other Laws, betwixt Law and Conſcience.

Doct. Yes, verily, very many, whereof thou haſt recited one before, where a Thing that is untrue is pleaded and proved; in which Caſe Judgment muſt be given according, as well in the Law Civil as in the Law Canon. And another Caſe is, that if the Heir make not his Inventory, he ſhall be bound after the Law Civil to all the Debts, though the Goods amount not to ſo much; and the Law Canon is not againſt that Law: And yet in Conſcience, the Heir, which in the Laws of England is called an Executor, is not in that Caſe charged with the Debts, but according to the Value of the Goods. And now I pray thee ſhew me ſome Caſes where Conſcience ſhall be ruled after Law.

Stud. I will with good-will ſhew thee ſomewhat as methinketh therein.

CHAP. XX.

¶ Here follow divers Caſes where Conſcience is to be ordered after the Law.

THE eldeſt Son ſhall have and enjoy his Father's Lands at the Common Law in

in Conscience, as he shall in the Law. And in Burgh-English the younger Son shall enjoy the Inheritance, and that in Conscience. And in Gavelkind all the Sons shall inherit the Land together, as Daughters, at the Common Law; and that in Conscience. And there can be no other Cause assigned why Conscience in the first Case is with the eldest Brother, and in the second with the younger Brother, and in the third Case with all the Brethren; but because the Law of England, by Reason of divers Customs, doth sometime give the Land wholly to the eldest Son, sometime to the youngest, and sometime to all. Also if a Man of his meer Motion make a Feoffment of two Acres of Land lying in two several Shires, and maketh Livery of Seisin in the one Acre in the Name of both; in this Case the Feoffee hath Right but only in the Acre whereof Livery of Seisin was made, because he hath no Title by the Law: But if both Acres had been in one Shire, he had had good Right to both. And in these Cases, the Diversity of the Law maketh the Diversity of Conscience.

Also if a Man of his meer Motion make a Feoffment of a Manor, and saith not, to have and to hold, &c. with the Appurtenances; in that Case the Feoffee hath Right to the demesne Lands, and to the Rents, if there be Atturnments, and to the Common pertaining to the Manor; but he hath neither Right to the Advowsons appendant, if any be, nor to the Villeins regardant. But if this Term, with the Appurtenances, had been in the Deed, the Feoffee had Right in Conscience as well to the Advowsons and Villeins, as to the Residue of the Manor: But if the

the King of his meer Motion give a Manor with the Appurtenances, yet the Donee hath neither Right in Law nor Conscience to the Advowsons nor Villeins. And the Diversity of the Law in these Cases makes the Diversity of Conscience.

Also if a Man make a Lease for Term of Years, yielding to him and to his Heirs a certain Rent, upon Condition that if the Rent be behind by xl. Days, &c. that then it shall be lawful to the Lessor and his Heirs to re-enter; and after the Rent is behind, the Lessor asketh the Rent according to the Law, and it is not payed, the Lessor dieth, his Heir entreth; in this Case his Entry is lawful both in Law and Conscience. But if the Lessor had died before he had demanded the Rent, and his Heir demand the Rent, and because it is not payed he re-entreth; in that Case his Re-entry is not lawful neither in Law nor Conscience.

Also if the Tenant in Dower sow her Land, and die before the Corn is ripe; the Corn in Conscience belongeth to her Executors, and not to him in Reversion: But otherwise it is in Conscience of Grass and Fruits. And the Diversity of the Law maketh there also the Diversity in Conscience.

Also if a Man seised of Lands in his Demesne as of Fee bequeath the same by his Last Will to another, and to his Heirs, and dieth; in this Case the Heir notwithstanding the Will hath Right to the Land in Conscience. And the Reason is, because the Law judgeth that Will to be void; and as it is void in the Law, so it is void in Conscience.

Also if a Man grant a Rent for Term of Life, and make a Lease of Land to the same Grantee for Term of Life, and the Tenant alieneth both in Fee; in this Case he in the Reversion hath good Title to the Land both in Law and Conscience, and not to the Rent. And the Reason is, because the Land by the Alienation is forfeited by the Law to him in the Reversion, and not the Rent.

Also if Lands be given to two Men, and to a Woman in Fee, and after one of the Men enter-marrieth with the Woman, and alieneth the Land, and dieth; in this Case the Woman hath Right but only to the third Part: But if the Man and the Woman had been married together before the first Feoffment, then the Woman, notwithstanding the Alienation of her Husband, should have had Right in Law and Conscience to the one Half of the Land. And so in these two Cases Conscience doth follow the Law of the Realm. Also if a Man have two Sons, one before Espousals, and another after Espousals, and after the Father dieth seised of certain Lands; in this Case the younger Son shall enjoy the Lands in this Realm, as Heir to his Father both in Law and Conscience. And the Cause is, because that Son born after Espousals is by the Law of this Realm the very Heir, and the elder Son is a Bastard. And of these Cases and many other like in the Law of England may be formed the Syllogism of Conscience, or the true Judgment of Conscience, in this Manner. Sinderesis ministreth the Major thus, Right wiseness is to be done to every Man: Upon which Major the Law of England ministreth the Minor thus, The Inheritance belongeth to the Son born after Espousals, and not

not to the Son born before Espousals: Then Conscience maketh the Conclusion, and saith, Therefore the Inheritance is in Conscience to be given to the Son born after Espousals. And so in other Cases infinite may be formed by the Law the Syllogism or the right Judgment of Conscience: Wherefore they that be learned in the Law of the Realm say, that in every Case where any Law is ordained for the Disposition of Lands and Goods, which is not against the Law of God, nor yet against the Law of Reason, that the Law bindeth all them that be under the Law in the Court of Conscience, that is to say, inwardly in his Soul. And therefore it is somewhat to marvel, that Spiritual Men have not endeavoured themselves in Time past to have more Knowledge of the King's Laws than they have done, or than they yet do: For by the Ignorance thereof they be oft-times ignorant of that that should order them according to Right and Justice, as well concerning themselves, as other that come to them for Counsel. And now, forasmuch as I have answered to thy Questions as well as I can; I pray thee that thou wilt shew me thy Opinion in divers Cases formed upon the Law of England, wherein I am in Doubt what is to be holden therein in Conscience.

Doct. Shew me thy Questions and I will say as me thinketh therein.

CHAP. XXI.

¶ The first Question of the Student.

Stud. IF any Infant that is of the Age of xx Years, and hath Reason and Wisdom to govern himself, selleth his Land, and with the Money thereof buyeth other Land of greater Value than the first was, and taketh the Profits thereof; whether may the Infant ask his first Land again in Conscience, as he may by the Law?

Doct. What thinkest thou in that Question?

Stud. Me seemeth that, forasmuch as the Law of England in this Article is grounded upon a Presumption, that is to say, that Infants commonly afore they be of the Age of xxi Years be not able to govern themselves, that yet, forasmuch as that Presumption faileth in this Infant, that he may not in this Case with Conscience ask the Land again that he hath sold to his great Advantage, as before appeareth.

Doct. Is not this Sale of the Infant and the Feoffment made thereupon, if any were, voidable in the Law?

Stud. Yes verily.

Doct. And if the Feoffee have no Right by the Bargain, nor by the Feoffment made thereupon, whereby should he then have Right thereto, as thou thinkest?

Stud. By Conscience, as me thinketh, for the Reason that I have made before.

Doct.

Doct. And upon what Law should that Conscience be grounded that thou speakest of? For it cannot be grounded by the Law of the Realm, as thou hast said thy self. And me thinketh that it cannot be grounded upon the Law of God, nor upon the Law of Reason: For Feoffments nor Contracts be not grounded upon neither of those Laws, but upon the Law of Man.

Stud. After the Law of Property was ordained, the People might not conveniently live together without Contracts; and therefore it seemeth that Contracts be grounded upon the Law of Reason, or at least upon the Law that is called Jus gentium.

Doct. Though Contracts be grounded upon the Law that is called Jus gentium, because they be so necessary and so general among all People; yet that proveth not that Contracts be grounded upon the Law of Reason: For though the Law called Jus gentium be much necessary for the People, yet it may be changed. And therefore if it were ordained by Statute, that there should be no Sale of Land, ne no Contract of Goods, and if there were, that it should be void, so that every Man should continue still seised of his Lands, and possessed of his Goods; the Statute were good. And then if a Man against that Statute sold his Land for a Sum of Money, yet the Seller might lawfully retain his Land according to the Statute: and then he were bound to no more but to repay the Money that he received, with reasonable Expences in that Behalf. And so in like wise me thinketh that in this Case the Infant may with good Conscience re-enter

into his first Land; because the Contract after the Maxims of the Law of the Realm is void; for, as I have heard, the Maxims of the Law be of as great Strength in the Law as Statutes. And some think that in this Case the Infant is bound to no more, but only to repay the Money to him that he sold his Land unto, with such reasonable Cost and Charges as he hath sustained by Reason of the same. But if a Man sell his Land by a sufficient and lawful Contract, though there lack Livery of Seisin or such other Solemnities of the Law, yet the Seller is bound in Conscience to perform the Contract. But in this Case the Contract is sufficient, and so me thinketh great Diversity betwixt the Cases.

Stud. For this Time I hold me contented with thy Opinion.

CHAP. XXII.

¶ The second Question of the Student.

If a Man that hath Lands for Term of Life be impanelled upon an Inquest, and thereupon leseth Issues and dieth; whether may those Issues be levied upon him in the Reversion in Conscience, as they may be by the Law?

Doct. If they may be levied by the Law, what is the Cause why thou dost doubt whether they may be levied by Conscience.

Stud. For there is a Maxim in the Laws of England, that where two Titles run together, the eldest Title shall be preferred. And in this Case the Title of him in the Reversion is be-

fore

fore the Title of the Forfeiture of the Issues. And therefore I doubt somewhat whether they may be lawfully levied.

Doct. By that Reason it seemeth thou art in Doubt what the Law is in this Case; but that must necessarily be known, for else it were in vain to argue what Conscience will therein.

Stud. It is certain that the Law is such; and so it is likewise if the Husband forfeit Issues, and die, those Issues shall be levied on the Lands of the Wife.

Doct. And if the Law be such, it seemeth that Conscience is so in like wise: For sith it is the Law, that for Execution of Justice every Man shall be impanelled when need requireth; it seemeth reasonable, that if he will not appear, that he should have some Punishment for his not Appearance, for else the Law should be clearly frustrate in that Point. And the Pain, as I have heard, is, that he shall lose Issues to the King for his not Appearance. Wherefore it seemeth not inconvenient nor against Conscience, though the Law be, that those Issues shall be levied of him in the Reversion, for that the Condition was secretly understood in the Law to pass with the Lease, when the Lease was made. And therefore it is for the Lessor to beware, and to prevent the Danger at the making of the Lease, or else it shall be adjudged his own Default. And then this particular Maxim whereby such Issues shall be levied upon him in the Reversion, is a particular Exception in the Law of England from the general Maxim that thou hast remembred be-

fore, that is to say, that where two Titles run together, that the eldest Title shall be preferred; and so in this Case the general Maxim in this Point shall hold no Place, neither in Law nor in Conscience, for by this particular Maxim the Strength of the general Maxim is restrained to every Intent, that is to say, as well in Law as in Conscience.

CHAP. XXIII.

¶ The third Question of the Student.

Stud. IF a Tenant for Term of Life or for Term of Years do Waste, whereby they be bound by the Laws to yield to him in the Reversion treble Damages, and so shall forfeit the Place wasted; whether he is also bound in Conscience to pay those Damages, and to restore that Place wasted immediately after the Waste done, as he is in the single Damages, or that he is not bound thereto till the treble Damages and Place wasted be recovered in the King's Court?

Doct. Before Judgment given in the treble Damages and of the Place wasted, he is not bound in Conscience to pay them, for it is uncertain what he should pay: But it sufficeth that he be ready till Judgment be given to yield Damages according to the Value of the Waste; but after the Judgment given, he is bound in Conscience to yield the treble Damages, and also the Place wasted. And the same Law is in all Statutes Penal, that is to say, that no Man is bound in Conscience to pay the Penalty till it be recovered by the Law.

Stud.

Stud. Whether may he that hath offended against such a Statute Penal, defend the Action, and hinder the Judgment, to the Intent he would not pay the Penalty, but only single Damages?

Doct. If the Action be taken right wisely according to the Statute, and upon a just Cause, the Defendant may in no wise defend the Action, unless he have a true dilatory Matter to plead, which should be hurtful to him if he pleaded not, though he be not bound to pay the Penalty till it be recovered.

CHAP. XXIV.

¶ The fourth Question of the Student.

Stud. If a Man enfeoff other in certain Land upon Condition, that if he enfeoff any other, that it may be lawful for the Feoffor and his Heirs to re-enter, &c. whether is this Condition good in Conscience, though it be void in the Law?

Doct. What is the Cause why this Condition is void in the Law?

Stud. The Cause is this, by the Law it is incident to every State of Fee-simple, that he that hath the Estate may lawfully by the Law, and by the Gift of the Feoffor, make a Feoffment thereof: And then when the Feoffor restraineth him after that he shall make no Feoffment to no Man against his own former Grant, and also against the Purity of the State of a Fee-

Fee-simple, the Law judgeth the Condition to be void: But if the Condition had been, that he should not have infeoffed such a Man or such a Man, that Condition had been good, for yet he might infeoff other.

Doct. Though the said Condition be against the Effect of the State of a Fee-simple, and also against the Law; nevertheless it is not against the Intent that the Parties agreed upon, and that at the Time of the Livery. And forasmuch as the Intent of the Parties was, that if the Feoffee infeoffed any Man of the Land, that the Feoffor should enter, and to that Intent the Feoffee took the State, and after brake the Intent; it seemeth that the Land in Conscience should return to the Feoffor.

Stud. The Intent of the Parties in the Laws of England is void in many Cases; that is to say, if he be not ordered according to the Law. And if a Man of his meer Motion, without any Recompence, intending to give Lands to another and to his Heirs, make a Deed unto him, whereby he giveth him those Lands, to have and to hold to him for ever, intending that by the Word for ever the Feoffee should have the Land to him and to his Heirs; in this Case his Intent is void, and the other shall have the Land only for Term of Life. Also if a Man give Lands to another, and to his Heirs for Term of xx Years, intending that if the Lessee die within the Term, that then his Heirs should enjoy the Land during the Term; in this Case his Intent is void, for by the Law of the Realm all Chattels real and

and personal shall go to the Executors, and not to the Heir. Also if a Man give Lands to a Man and to his Wife, and to a third Person, intending that every of them should take the third Part of the Land as three common Persons should, his Intent is void; for the Husband and the Wife, as one Person in the Law, shall take only the one half, and the third Person the other half. But these Cases be always to be understood where the said Estates be made without any Recompence. And forasmuch as in this principal Case the Intent of the Feoffor is grounded against the Law, and that there is no Recompence appointed for the Feoffment, methinketh that the Feoffor hath neither Right to the Land by Law nor Conscience: For if he should have it by Conscience, that Conscience should be grounded upon the Law of Reason; and that it cannot, for Conditions be not grounded upon the Law of Reason, but upon the Maxims and Customs of the Realm; and therefore it might be ordained by Statute, that all Conditions made upon Land should be void. And when a Condition is void by the Maxims of the Law, it is as fully void to every Intent, as if it were made void by Statute: And so methinketh that in this Case the Feoffor hath no Right to the Land in Law nor in Conscience.

Doct. I am content thy Opinion stand, till we shall have hereafter a better Leisure to speak farther in this Matter.

CHAP. XXV.

¶ The fifth Question of the Student.

Stud. If a Fine with Proclamation be levied according to the Statute, and no Claim made within v. Years, &c. whether is the Right of a Stranger extincted thereby in Conscience, as it is in the Law?

Doct. Upon what Consideration was that Statute made.

Stud. That the Right of Lands and Tenements might be the more certainly known, and not to be so uncertain as they were before that Statute.

Doct. And when any Law of Man is made for a common Wealth, or for the good Peace and Quietness of the People, or for any Inconvenience or Hurt to be saved from them, that Law is good; though percase it extinct the Right of a Stranger, and must be kept in the Court of Conscience: For, as it is said before in Chap. 4. by Laws right wisely made by Man, it appeareth who hath Right to the Lands and Goods; for whatsoever a Man hath by such a Law, he hath it right wisely; and whatsoever he holdeth against such a Law, he holdeth unrightwisely. And furthermore it is said there, all the Laws made by Man which be not contrary to the Law of God, must be observed and kept, and that in Conscience, and he that despiseth them despiseth God, and he that resisteth them resisteth God. Also it is to be understood, that Possessions and the Right thereof are subject to the Laws, so that they therefore with a Cause reasonable may be translated and altered

altered from one Man to another by Act of the Law. And of this Consideration that Law is grounded, that by a Contract made in Fairs and Markets the Property is altered, except the Property be to the King, so that the Buyer pay Toll, or do such other Things as is accustomed there to be done upon such Contracts, and that the Buyer knoweth not the former Property. And in the Law Civil there is a like Law, that if a Man have another Man's Goods with a Title three Years, thinking that he hath Right to it, he hath the very Right unto the Thing; and that was made for a Law, to the Intent that the Property and Right of Things should not be uncertain, and that Variance and Strife should not be among the People. And forasmuch as the said Statute was ordained to give a Certainty of Title in the Lands and Tenements comprised in the Fine, it seemeth that that Fine extincteth the Title of all other, as well in Conscience, as it doth in the Law. And sith I have answered to thy Question, I pray thee let me know thy Mind in one Question concerning tailed Lands, and then I will trouble thee no farther at this Time.

CHAP. XXVI.

¶ A Question made by the Doctor, how certain Recoveries that be used in the King's Courts to defeat tailed Land, may stand with Conscience.

I Have heard say, That when a Man that is seised of Lands in the Tail selleth the Land, that it is commonly used, that he that buyeth the Land, shall, for his Surety, and for the avoiding of the Tail in that Behalf, cause some of his Friends to recover the said Lands against the said Tenant in Tail: Which Recovery, as I have been credibly informed, shall be had in this Manner. The Demandants shall suppose in their Writ and Declaration, that the Tenant hath no Entry but by such a Stranger as the Buyer shall list to name and appoint, where indeed the Demandants never had Possession thereof, nor yet the said Stranger. And thereupon the said Tenant in Tail shall appear in the Court, and by Assent of the Parties shall vouch to warrant one that he knoweth well hath nothing to yield in Value. And the Vouchee shall appear, and the Demandants shall declare against him; and thereupon he shall take a Day to imparl at the same Term, and at that Day by Assent and Covin of the Parties he shall make Default; upon which Default, because it is a Default in despite of the Court, the Demandants shall have Judgment to recover against the Tenant in Tail, and he over in Value against the Vouchee: And this

this Judgment and Recovery in Value is taken for a Bar of the Tail for ever. How may it therefore be taken, that the Law standeth with Conscience, that as it seemeth, alloweth and favoureth such feigned Recoveries?

Stud. If the Tenant in Tail sell the Land for a certain Sum of Money, as is agreed betwixt them, at such a Price as is commonly used of other Lands, and for the Surety of the Sale suffereth such a Recovery as is aforesaid; what is the Cause that moveth thee to doubt whether the said Contract, or the Recovery made thereupon, for the Surety of the Buyer that hath truly payed his Money for the same, should stand with Conscience?

Doct. Two Things cause me to doubt therein. One is, for that after our Lord had given the Land of Behest to Abraham and to his Seed, that is to say, to his Children, in Possession alway to continue, he said to Moses, as it appeareth Levit. 25. The Land shall not be sold for ever, for it is mine: And then our Lord assigned a certain Manner how the Land might be redeemed in the Year of Jubilee, if it were sold before. And forasmuch as our Lord would that the Land so given to Abraham and his Children should not be sold for ever, it seemeth that he doth against the Ensample of God that alieneth or selleth the Land that is given to him and to his Children, as Lands entailed be given. Another Cause is this: It appeareth by the Commandment of God, that Thou shalt not covet the House of thy Neighbour, &c. And if that Concupiscence be prohibited, more stronger then the unlawful taking and with-holding there-

thereof is prohibited: And forasmuch as tailed Land, when the Ancestor is dead, is a Thing that of Right is belonging to his Heir, for that he is Heir according to the Gift, how may the Land with Right or Conscience be holden from him?

Stud. Notwithstanding the Prohibition of Almighty God, whereby the Land that was given to *Abraham* and to his Seed might not be aliened for ever, yet Land within walled Towns might lawfully be aliened for ever, except the Lands of the *Levites*, as appeareth in the said 25th Chapter of *Leviticus*. And so it appeareth that the said Prohibition was not general for every Place, and that among the Jews. And it appeareth also that it was given only to *Abraham* and his Children, and so it was not generally to all People. And it appeareth also, that it extended not but only to the Land of Promission, as it appeareth by the Words of the said Chapter, where it is said thus, *All the Region of our Possession shall be sold under the Condition of Redeeming*: Whereby appeareth that Lands in other Countries be not bound to that Condition; and as they be not bound to that Condition, by the same Reason it followeth that they be not bound to the same Succession. Therefore that said Law, that wills that the Land given to *Abraham* and to his Seed shall not be sold for ever, bindeth no Land out of the Land of Promission; and some Men will say, that sithen the Passion of our Lord was promulgate and known, bindeth not there. And to the second Reason, which is grounded upon the Commandment of God;

it must needs be granted that it is not lawful to any Man unlawfully to covet the House of his Neighbour, and that then more stronger he may not unlawfully take it from him. But then it remaineth for thee yet to prove how in this Case this tailed Land that is sold by his Ancestor, and whereof a Recovery is had recorded in the King's Court, may be said the Lands of the Heir.

Doct. That may be proved by the Law of the Realm, that is to say, by the Statute of Westminster 2. cap. 1. where it is said thus. The Will of the Giver expresly contained in the Deed of his Gift shall be from henceforth observed, so that they to whom the Tenements be so given shall not have Power to alien, but that the Lands after their Death shall remain to the Issue, or return to the Donor, if the Issue fail. By the which Statute it appeareth evidently, that though they to whom the Tenements were so given, aliened them away, that yet nevertheless they in Law and Conscience, by Reason of the said Statute, ought to remain to their Heirs, according to the Gift; for it is holden commonly by all Doctors, that the Commandments and Rules of the Law of Man, or of a positive Law that is lawfully made, bind all that be Subjects to the Law according to the Mind of the Maker, and that in the Court of Conscience.

Stud. Dost thou think that if a Man offend against a Statute Penal, that he offendeth in Conscience? Admit that he do it not of a wilful Disobedience, or that he will not obey the

Law?

Law: For if he do it of Disobedience, I think he offendeth.

Doct. If it be but only a Statute that is called Popular, it bindeth not in Conscience to the Payment of the Penalty, till it be recovered by the Law, and then it doth bind in Conscience: But if a Statute be made principally to remedy the Hurt of one Party, and for that Hurt it giveth a Penalty to the Party, in that Case the Offender of the Statute is bound immediately to restore the Damages to the Value of the Hurt, as it is upon the Statute of Waste; but the Penalty above the Hurt he is not bound to pay till Judgment be given, as it is said before. But Statutes by the which it is assigned who shall have Right or Property to these Lands and Tenements, or to these Goods or Chattels, if it be not against the Law of God nor against the Law of Reason, bind all them that be subject to the Law in Law and Conscience. And such a Statute is the Statute of Westminster 2. whereof we have treated before; wherefore it must be observed by Conscience.

Stud. But some hold that the Statute of Westm. 2. was made of a Singularity and Presumption of many that were at the said Parliament, for exalting and magnifying of their own Blood; and therefore they say that that Statute made by such a Presumption bindeth not in Conscience.

Doct. It is very perilous to judge for certain that the said Statute was made of such Presumption as thou speakest of: For there be many Considerations to move that the said

Sta-

Statute was not made of ſuch Preſumption, but rather of a very good Mind of all the Parliament, or at the leaſt of the moſt Part thereof, and for the common Wealth of all the Realm; and firſt in the King, the which in the ſaid Parliament was the Head, and moſt chief and principal Part of the Parliament, (as he is in every Parliament) cannot be noted to be ſuch Intent: For it is not neceſſary, nor was it not then in Uſe, that Lands of the Crown ſhould be entailed. And in Spiritual Men, ne yet in certain Burgeſſes and Citizens of the ſaid Parliament, which at that Time had no Land, there can be noted no ſuch Singularity: Nor yet in the Noblemen and Gentlemen, nor ſuch other as were of the ſaid Parliament, and had Lands and Tenements. It is not good to judge in certain that they did it of ſuch Preſumption; but it is good and expedient in this Caſe, as it is in other Caſes that be in Doubt, to hold the ſurer Way, and that is, that it was made of Charity, to the Intent that he nor the Heirs of him to whom the Land was given, ſhould not fall into extreme Poverty, and thereby haply run into Offence againſt God. And though it were true, as they ſay, that it was not made of Charity, but of Preſumption and Singularity, as they ſpeak of: Nevertheleſs, foraſmuch as the Statute is not againſt the Law of God, nor againſt the Law of Reaſon, it muſt be obſerved by all them that be Subjects unto that Law. For, as John Gerſon, in the Treatiſe that he entitled in Latin, De vitâ ſpirituali Animæ,

Animæ, the fourth Lesson, and the third Corollary, saith, that God wills that Makers of Laws judge only of outward Things, and reserve secret Things to him. And so it appeareth that Man may not judge of the inward intent of the Deed, but of such Things as be apparent and certain: But it is not apparent that there was any such corrupt Intent in the Makers of the said Statute: How may it therefore be said that the Law is good or rightwise, that not only suffereth such Things against the Statute, but also against the Commandment of God?

Doct. To that some answer and say, that when the Land is sold, and a Recovery is had thereupon in the King's Court of Record, that it sufficeth to bar the Tail in Conscience; for they say, that as the Tail was first ordained by the Law, so they say that by the Law it is adnulled again.

Doct. Be thou thy self Judge, if in that Case there be like Authority in the making of the Tail as there is in the adnulling thereof: For it was ordained by Authority of Parliament, the which is alway taken for the most high Court in this Realm before any other, and it is adnulled by a false Supposal, for that, that they that be named Demandants should have Right to the Land, where in Truth they never had Right thereto: Whereupon followeth a false Supposal in the Writ, and a false Supposal in the Declaration, and a Voucher to warrant by Covin of such a Person as hath nothing to yield in Value; and thereupon by Covin and Collusion of the Parties followeth

eth the Default of the Vouchee, by the which Default the Judgment shall be given. And so all the Judgment is derived and grounded of the untrue Supposal and Covin of the Parties, whereby the Law of the Realm, that hath ordained such a Writ of Entry to help them that have Right to Lands or Tenements, is defrauded, the Court is deceived, the Heir is disherited, and, as it is to doubt, the Buyer and the Seller, their Heirs and Assigns, having Knowledge of the Tail, be bound to Restitution. And verily I have heard many Times, that after the Law of the Realm such Recoveries should be no Bar to the Heir in the Tail, if the Law of the Realm might be therein indifferently heard.

Stud. I cannot see but that after the Law of the Realm it is a Bar of the Tail; for when the Tenant in Tail hath vouched to Warranty, and the Vouchee hath appeared and entred into the Warranty, and after hath made Default in despite of the Court, whereupon Judgment is given for the Demandant against the Tenant, and for the Tenant that he shall recover in Value against the Vouchee; if the Heir in the Tail should after bring his Formedon, and recover the Lands entailed, and after the Vouchee purchaseth Lands, then should the Heir also have Execution against him to the Value of the Lands entailed, as Heir to his Ancestor that was Tenant in the first Action, and so he should have his own Lands, and also the Lands recovered in Value. And therefore, because of the Presumption that the Vouchee may purchase Lands after the Judgment, some be of

of Opinion that it is in the Law a good Bar of the Tail.

Doct. I suppose that in that Case thou hast put that the Vouchee may bar the Heir in Tail of his Recovery in Value, because he hath recovered the first Lands. Nevertheless I will take a Respite to be advised of that Recovery in Value. And if thou canst yet shew me any other Consideration, why the said Recoveries should stand with Conscience, I pray thee let me hear thy Conceit therein; for the Multitude of the said Recoveries is so great, that it were great Pity that all should be bound to Restitution that have Lands by such Recoveries, sith there is none (as far as I can hear) disposed them to restore.

Stud. Some Men make another reason to prove that the said Recoveries should be sufficient by the Law to avoid the Statute of Westminster, and if they be sufficient thereto, they be sufficient in Conscience.

Doct. What is their Reason therein?

Stud. In the 7th Year of H. 8. c. 4. among other Things it is enacted, that all Recoverers, their Heirs and Assigns, may avow and justify for Rents, Services and Customs by them recovered, as they against whom they recovered might have done. And then they say, that when the Parliament gave to such Recoverers Authority to avow and justify for such Rents, Customs and Services as they recovered, that the Intent of the Parliament was, that such Recoverers should have Right to that for the which they should avow or justify: For else they say that it should be in vain to give them such Power,

Power, and that the Parliament should else be taken in Manner as Fortifiers of wrongful Titles: And so they say that such Recoverers, by Reason of the said Statute, have Right by the Law.

Doct. That Statute, as it seemeth, was made only to give to the Recoverers a Form to avow and justify, which they had not before, though they had recovered upon a good Title. And the Cause why they had no Form to avow or justify before the said Statute was, forasmuch as the Recoverers did not by the Pretence of their Action affirm the Possession of him or them against whom they recovered, nor claimed not by them, but rather disaffirmed and destroyed their Estate. And therefore they cannot alledge any Continuance of their Title by them, as they may that have Rents or Services, or such other, of the Grant of other by Deed or by Fine. And therefore, as it seemeth, the most principal Intent of the Statute was, that such Recoverers should avow and justify for Rents, Services and Customs, as they should or might do that had them by Fine or Deed; not having any respect, as it seemeth, whether they recovered against Tenant in Fee-simple or in Fee-tail; nor whether the Recoveries were had upon a rightful Title. And therefore, as me seemeth, the said Statute neither affirmeth nor disaffirmeth the Title of Recoverers, whereby they do avow: For if a Man had Right before the Recovery, the Right should remain unto him notwithstanding the said Statute; and so me seemeth that the Title of them that have the

Land

Land entailed by such Recoveries is nothing fortified nor affirmed by the said Statute, but that they are in the same Case as they were before. What thinkest thou therein?

Stud. This Matter is great: For, as thou sayest, there be so many that have tailed Lands by such Recoveries, that it were great Pity and Heaviness to condemn so many Persons, and to judge that they all were bound to Restitution. For I think there be but few in this Realm that have Lands of any notable Value, but that they or their Ancestors, or some other by whom they claim, have had Part thereof by such Recoveries: Insomuch that Lords Spiritual and Temporal, Knights, Squires, Rich Men and Poor, Monasteries, Colleges and Hospitals have such Land, for such Recoveries have been used of long Time: Who may think therefore, without great Heaviness, that so many Men should be bound to Restitution, and that yet, as thou sayest, no Man disposeth him to make Restitution? And so I am in a Manner perplexed, and wot not what to say in this Case, but that yet I trust that Ignorance may excuse many Persons in that Behalf.

Doct. Ignorance of the Deed may excuse, but Ignorance of the Law excuseth not, but it be invincible, that is to say, that they have done that in them is to know the Truth: As to counsel with learned Men, and to ask them what the Law is in that Behalf; and if they answer them that they may do this or that lawfully, then they be thereby excused in Conscience;

science; but yet in Man's Law they be not thereby discharged: But they that have taken upon them to have Knowledge of the Law, be not excused by Ignorance of the Law; ne no more are they that have a wilful Ignorance, and that would rather be Ignorant than to know the Truth, and therefore they will not dispose them to ask any Counsel in it. And if it be of a Thing that is against the Law of God or the Law of Reason, no Man shall be excused of Ignorance; and so there be but few that be excused by Ignorance.

Stud. What then? Shall we condemn so many and so notable Men?

Doct. We shall not condemn them, but we shall give them their Peril.

Stud. Yet I trust their Danger is not so great that they should be bound to Restitution: For John Gerson saith in his said Book called De unitate Ecclesiastica, consideratione secunda, Quod communis error facit jus, that is to say, A common Error maketh a Right. Of which Words, as it seemeth, some Trust may be had, that though it were fully admitted the said Recoveries were first had upon an unlawful Ground, and against the good Order of Conscience, that yet nevertheless, forasmuch as they have been used of long Time, so that they have been taken of divers Men that have been right-well learned, in manner as for a Law, that the Buyers partly be excused, so that they be not bound to Restitution. And moreover, it is certain that the Statute of Westminster 2. nor none other Statute made by Man, cannot be of greater Value or Strength than

than was the Bond of Matrimony that was ordained of God. And though that Bond of Matrimony was indissolvable, yet neverthe-less Moses suffered a Bill of Refusal of the Jews, which in Latin is called Libellum Repudii, and so they might thereby forsake their Wives, as it appeareth Deuteron. 22. And therefore like as a Dispensation was suffered against that Bond, so it seemeth it may be against this Statute.

Doct. As to that Reason that thou hast last made of a Bill of Refusal, let all Purchasers of Land hear what our Lord saith in the Gospel of the Jews, of that Bill of Refusal; Matthew 19. where he saith thus, *For the Hardness of your Hearts Moses suffered you to leave your Wives: For at the Beginning it was not so.* Of which words Doctors hold commonly, that though such a Bill of Refusal was lawful, so that they that refused their Wives thereby should be without Pain in the Law, that yet it was never lawful so that it should be without Sin. And so likewise it may be said in this Case, that such Recoveries be suffered for the Hardness of the Hearts of Englishmen, which desire Land and Possession with so great Greediness, that they cannot be withdrawn from it neither by the Law of God nor of the Realm. And therefore the rich Men should not take the Possessions of poor Men from them by Power, without Colour of Title, that is to say, neither by open Disseisin, or by the only Sale of the Tenant in Tail, and so to hold them against the express Words of the Statute; such Recoveries have been suffered. And though

for their great Multitude they may haply be without Pain as to the Law of the Realm; yet it is to fear that they be not without Offence as against God. And as to the other Reason, that a common Error should make a Right, those Words, as me seemeth, be to be thus understood, that a Custom used against the Law of Man shall be taken in some Countries for Law, if the People be suffered so to continue. And yet some Men call such a Custom an Error, because that the Continuance of that Custom against the Law was partly an Error in the People, for that they would not obey the Law that was made by their Superiors to the contrary of that Custom. But it is to be understood, that the said Recoveries, though they have been long used, may not be taken to have the Strength of a Custom; for many as well learned as unlearned have alway spoken against them, and yet do. And furthermore, as I have heard say, a Custom or a Prescription in this Realm against the Statutes of the Realm prevails not in the Law.

Stud. Though a Custom in this Realm prevaileth not against a Statute as to the Law, yet it seemeth that it may prevail against the Statute in Conscience: For though Ignorance of a Statute excuseth not in the Law, nevertheless it may excuse in Conscience; and so it seemeth that it may do of a Custom.

Doct. But if such Recoveries cannot be brought into a lawful Custom in the Law, it seemeth they may not be brought into a Custom in Conscience; for Conscience must alway

may be grounded upon the Law, and in this Case it cannot be grounded upon the Law of Reason, nor upon the Law of God; and therefore if the Law of Man serve not, there is no ground whereupon Conscience in this Case may be grounded. And at the Beginning of such Recoveries, they were taken to be good, because the Law should warrant them to be good, and not by Reason of any Custom: And so if the Reason of the Law will not serve in the Recoveries, the Custom cannot help; for an evil Custom is to be put away. And therefore me seemeth that the Recoveries be not without Offence against God, though haply for their great Multitude, and that there should not be as it were a Subversion of the Inheritance of many in this Realm, as well of Spiritual as Temporal, they be without Pain in the Law of the Realm; except such Recoveries as by the common Course of the Law be voidable in the Law by Reason of some Use, or of some other special Matter: But what Pain that is, I will not temerously judge, but commit it to the Goodness of our Lord, whose Judgments be very deep and profound; nor I will not fully affirm that they that have Lands by such Recoveries, ought to be compelled to Restitution: But this seemeth to me to be good Counsel, that every Man hereafter hold that is certain, and leave that is uncertain, and that is, that he keep himself from such Recoveries, and then he shall be free from all scrupulousness of Conscience in that Behalf.

Stud.

Stud. It seemeth that in this Question thou ponderest greatly the said Statute of Westminster 2. and that though it be but only a Law made by Man, that yet, forasmuch as it is not against the Law of Reason nor the Law of God, thou thinkest that it must be holden in Conscience: And over that, as it seemeth, thou art somewhat in doubt whether those Recoveries be any Bar to the Heir in the Tail by the Law of the Realm, unless that he have in Value in Deed upon the Vouchee; and that thou wilt thereupon take a Respite, or thou shew thy full Mind therein: And in like wise thou thinkest, as I take it, that those Recoveries cannot be brought into a Custom, but that the longer that they be suffered to continue, if they be not good by the Law, the greater is the Offence against God. And therefore thou ponderest little that Custom, but yet thou agreest that it is good to spare the Multitude of them that be past, lest a Subversion of the Inheritance of many of this Realm might follow, and great Strife and Variance also, if they should be adnulled for the Time past, except there be any other special Cause to avoid them by the Law, as thou hast touched in the last Reason: But thou thinkest that it were good, that from henceforth such Recoveries should be clearly prohibited, and not be suffered to be had in Use, as they have been before; and thou counsellest all Men therefore to restrain themselves from such Recoveries hereafter.

Doct. Thou takest well that I have said, and according as I have meant it.

Stud. Now, I pray thee, sith I have heard thy Question of these Recoveries, according to thy Desire, that thou wouldest answer me to some particular Questions concerning tailed Lands, whereof thou hast at this Time given us Occasion to speak.

Doct. Shew me these Questions, and I will shew thee my Mind therein with good-will.

CHAP. XXVII.

¶ The first Question of the Student, concerning tailed Lands.

Stud. If a Disseisor make a Gift in Tail to John at Stile, and J. at St. for the redeeming of the Title of the Disseisee agreeth with him, that he shall have a certain Rent out of the same Land to him and to his Heirs, and for the Surety of the Rent it is devised that the Disseisee shall release his Right in the Land, &c. and that such a Recovery as we have spoken of before shall be had against the said J. at St. to the Use of the Payment of the said Rent and of the former Tail: Whether standeth that Recovery well with Conscience or not, as thou thinkest?

Doct. I suppose it doth, for it is made for the Strength and Surety of the Tail, which the Disseisee might have clearly defeated and avoided if he would: And therefore I think if the said J. at St. had granted to the Disseisee only by his Deed a certain Rent for releasing of his Title, that Grant should have bound the Heirs in the Tail for ever. And then if the Disseisee for his more Surety, will have such a Recovery, as before

fore appeareth, it seemeth that Recovery standeth with good Conscience.

Stud. It seemeth that thy Opinion is right good in this Matter. And also it appeareth that with a reasonable Cause some particular Recoveries may stand both with Law and Conscience to bar a Tail.

CHAP. XXVIII.

¶ The second Question of the Student, concerning tailed Lands.

If a Tenant in Tail suffer a Recovery against him of his Lands entailed, to the Intent that the Recoverer shall stand seised thereof to the Use of a certain Woman whom he intendeth to take to his Wife, for Term of Life, and after to the Use of the first Tail, and after he marrieth the same Woman: Whether standeth that Recovery with Conscience, though other Recoveries upon Bargains and Sales did not?

Doct. It seemeth yes; for though the Statute be, that they to whom the Tenements be so given should not have Power to alien, but that the Lands after their Death should remain to their Issues, or revert to the Donors if the Issues failed; yet if he to whom the Lands were so given take a Wife, and dieth seised without Heir of his Body, and the Donor enter, the Woman shall recover against him the third Part, to hold in the Name of her Dowry for Term of her Life, though the Tail be determined. And the same Law is of

Tenant by the Courtesy, that is to say, of him that happeneth to marry one that is an Inheritrix of the Land entailed, and they have Issue; the Wife dieth, and the Issue dieth; he shall have the Lands for Term of his Life as Tenant by the Courtesy, notwithstanding the Words of the Statute, which say, that after the Death of the Tenant in Tail without Issue, the Lands shall revert to the Donor: And I think the Cause is, because the Intent of the Statute shall not be taken, that it intended to put away such Titles as the Law should give by Reason of the Tail. And so it seemeth that a like Intent of the Statute shall be so taken for Jointures, for else the Statute might be sometime a letting of Matrimony, and it is not like that the Statute intended so. And therefore it seemeth, that by the only Deed of the Tenant in Tail a Jointure may be made by the Intent of the Statute, though the Words of the Statute serve not expressly for it; for many Times the Intent of the Letter shall be taken, and not the bare Letter; as it appeareth in the same Statute, where it is said, that he to whom the Lands be given shall have no Power to alien; yet the same Statute is construed, that neither he nor the Heirs of his Body shall have no Power to alien: And so methinketh that such an Intent shall be taken here for saving of Jointures.

Stud. Truth it is, that sometime the Intent of a Statute shall be taken farther than the express Letter stretcheth; but yet there may no Intent be taken against the express Words of the Statute, for that should be rather an

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Interpretation of the Statute, than an Exposition: And it cannot be reasonably taken, but that the Intent of the Makers of the said Statute was, that the Land should remain continually in the Heirs of the Tail, as long as the Tail endureth; and there can no Jointure be made neither by Deed nor by Recovery, but that the Tail must thereby be discontinued. And therefore this Case of Jointure is not like to the said Cases of Tenant in Dower or Tenant by the Curtesy: For the Title of Dowry and of Tenancy by the Curtesy groweth most specially by the Continuance of the Possession in the Heirs of the Tail, but it is not so of Jointures: And therefore by the only Deed of the Tenant in the Tail there may no Jointures be lawfully made against the express Words of the Statute. And if there be any made by Way of Recovery, then it seemeth that it must be put under the same Rule as other Recoveries must be of Lands entailed.

CHAP. XXIX.

¶ The third Question of the Student, concerning tailed Lands.

If John at Noke, being seised of Land in Fee, of his meer Motion makas a Feoffment of certain Lands to the Intent that the Feoffees shall thereof make a Gift to the said J. at Noke to have to him and to the Heirs of his Body, and they make the Gift according; and after the said J. at Noke falleth into Debt, wherefore he is

is taken and put in Prison, and thereupon for Payment of his Debts he selleth the same Land, and for Surety of the Buyer he suffereth a Recovery to be had against him in such a Manner as before appeareth: Whether standeth that Recovery with Conscience or not?

Doct. I would here make a little Digression to ask thee another Question, or that I make answer to thine; that is to say, to feel thy Mind how the Law by the which the Body of the Debtor shall be taken and cast into Prison, there to remain till he have paid the Debt, may stand with Conscience, specially if he have nothing to pay it with; for as it seemeth if he will relinquish his Goods, which in some Laws is called in Latin, Cedere bonis, that he shall not be imprisoned; and that is to be understood most specially, if he be fallen into Poverty, and not through his own Default.

Stud. There is no Law in the Realm that the Defendant may in any Case Cedere bonis, and, as me seemeth, if there were such a Law, it should not be indifferent; for as to the Knowledge of him that the Money is owing to, the Debtor might, Cedere bonis, that is to say, relinquish his Goods, and yet retain to himself secretly great Riches. And therefore that Law in such Case seemeth more indifferent and righteous, that committeth such a Debtor to the Conscience of the Plaintiff to whom the Money is owing, than the committing him to the Conscience of him that is the Debtor; for in the Debtor some Default may be assigned; but in him to whom the Money is owing may be assigned no Default.

Doct.

Doct. But if he to whom the Debt is owing knoweth that the Debtor hath nothing to pay the Debt with, and that he is fallen into Poverty by some Casualty, and not through his own Default; doth the Law of England hold that he may with good Conscience keep the Debtor still in Prison till he be paid?

Stud. Nay verily, but it thinketh more reasonable to appoint the Liberty and the Judgment of Conscience in that Case to the Debtee than to the Debtor, for the Cause before rehearsed. And then the Debtor, if he knew the Truth, is (as thou hast said) bound in Conscience to let him go at Liberty, though he be not compellable thereto by the Law. And therefore admitting it for this Time, that the Law of England in this Point is good and just, I pray thee that thou wilt make answer to my Question.

Doct. I will with good-will: And therefore, as me seemeth, forasmuch as it appeareth that the said Gift was made of the meer Liberty and Free-will of the said John at Noke, and without any Recompence, that therefore it cannot be otherwise taken, but that the Intent of the said John at Noke, as well at the Time of the said Feoffment as at the Time that he received again the said Gift in the Tail, was, that if he happened afterwards to fall into Poverty, that he might alien the said Land to relieve him with: For how may it be thought that a Man will so much ponder the Wealth of his Heir, that he will forget himself? And so it seemeth that not only the said Recovery standeth with Conscience, but also if he had

made only a Feoffment of the Land, the Feoffment should be in Conscience a good Bar of the Tail: But if the said Feoffment and Gift had been made in Consideration of any Recompence of Money, or for any Matrimony, or such other, then the Feoffment of the said John at Noke should not bind his Heir, and if he then suffered any Recovery thereof, then the Recovery should be of like Effect as other Recoveries whereof we have treated before, and that which I said, it was good to favour rather for their Multitude, than for the Conscience. And the same Law is, that if the Son and the Heir of the said John at Noke, in Case that the said Gift was made without Recompence, alien the Land for Poverty after the Death of his Father; the Recovery bindeth not but as other Recoveries do: For it cannot be thought that the Intent of the Father was, that any of his Heirs in Tail should for any Necessity disherit all other Heirs in Tail that should come after him, but for himself, methinketh, it is reasonable to judge in such Manner as I have said before.

Stud. And though the Intent of the said John at Noke, when he made the said Feoffment, and when he took again the said Gift in Tail, were, that if he fell in need, that he might alien: Yet I suppose that he may not alien, though percase for the more Surety he declared his Intent to be such upon the Livery of Seisin: For that Intent was contrary to the Gift that he freely took upon him; and when any Intent or Condition is declared or reserved against the State that any Man maketh or excepteth, then such an Intent or Condition is void by the Law, as by a Case that

that hereafter followeth will appear: That is to say, If a Man make a Feoffment in Fee, upon Condition that the Feoffee shall not alien to any Man, that Condition is void; for it is incident to every State of the Fee-simple, that he that is so seised may alien. And like as in a Fee-simple there is incident a Power to alien, so in a State-tail, there is a secret Intent understood in the Gift, that no Alienation shall be made. And therefore though the Intent of the said John at Noke were, that if he fell into Poverty, that he might sell, and though he at the taking of the Gift openly declared his Intent to be so: Yet the Intent should be void by the Law, as me seemeth; and if it be void by the Law, it is also void in Conscience; and so the said Recovery must be taken in this Case to be of the same Effect as Recoveries of other Lands intailed be, and in no other Manner.

CHAP. XXX.

¶ The fourth Question of the Student, concerning Recoveries of Inheritances entailed.

Stud. If an Annuity be granted to a Man to have and to perceive to the Grantee, and to the Heirs of his Body, of the Coffers of his Grantor, and after the Grantee suffereth a Recovery against him in a Writ of Entry by the Name of a Rent in Dale of a like Sum as the Annuity is of, with Vouchers and Judgment, after the common Course, and both Parties

ties intend that the Annuity shall be recovered: Whether shall the Recovery bind the Heir in Tail of his Annuity?

Doct. What if it were a Rent going out of Land, of what Effect should the Recovery be then?

Stud. It should be then of like Effect as if it were of Land.

Doct. And so it seemeth to be of this Annuity; for, as me thinketh, a Rent and Annuity be of one Effect; for the one of them shall be paid in ready Money as the other shall.

Stud. Truth, and yet there be many great Diversities betwixt them in the Law.

Doct. I pray you shew me some of these Diversities.

Stud. Part I shall shew thee, but I wot not whether I can shew thee all. But first thou shalt understand; that one Diversity is this. Every Rent, be it Rent-service, Rent-charge, or Rent-seck, is going out of Land, but chargeth only the Person, that is to say, the Grantor, or his Heirs that have Assets by Discent, or the House, if it be granted by a House of Religion to perceive of their Coffers. Also of an Annuity there lieth no Action, but only a Writ of Annuity, against the Grantor, his Heirs or Successors: And that a Writ of Annuity lieth never against the Pernor, but only against the Grantor or his Heirs. But of a Rent the same Action may lie as doth of Land, as the Case requireth: And it lieth sometime of Rent against the Pernor of the Rent, that is to say, against him that taketh the Rent wrongfully, and sometime against neither, as of a Rent-service Assise may lie for the

the Lord against the Mesne and the Disseisor, or sometime against the Mesne only, if he did also the Disseisin. Also an Annuity is never taken for Assets, because it is no Freehold in the Law, ne it shall not be put in Execution upon a Statute-merchant, Statute-staple, ne Elegit, as a Rent may. And because the said Writ of Entry lay not in this Case of this Annuity, and that it cannot be intended in the Law to be the same Annuity, though it be of like Sum with the Annuity, ne though the Parties assented and meant to have the same Annuity recovered by the said Writ of Entry; therefore the said Recovery is void in Law and Conscience. But if such a Recovery be had of Rent with the Voucher over, then it shall be taken to be of like Effect as Recoveries of Lands be, in such Manner as we have treated of before.

CHAP. XXXI.

¶ The fifth Question of the Student, concerning tailed Lands.

IF Lands be given to a Man and to his Wife, in the Name of her Jointure, by the Father of the Husband, to have and to hold to them and to the Heirs of their two Bodies begotten, and after they have Issue, and the Husband dieth, and the Wife alieneth the Land, and against the Statute of 11 H. 7. suffereth a Recovery thereof to be had against her, to

to the Use of the Buyer, and after her Son and Heir apparent, that is Heir to the Tail, releaseth to the Recoverers by Fine, and dieth, having a Brother alive, and after the Mother dieth; who hath Right to the Land, the Buyer, or the Brother of him that released?

Doct. What is thine Opinion therein? I pray thee shew me.

Stud. Me seemeth that the Buyer hath Right; for by the said Statute made in the 11th Year of H. 7. among other Things it is enacted, that if any Woman which hath Lands of the Gift of her Husband, or of the Gift of any of the Ancestors of the Husband, suffer any Recovery thereof against her by Covin, that then such Recovery shall be void, and that it shall be lawful to him that should have the Land after the Death of the Woman to enter, and it to hold as in his first Right: Provided alway that that Statute shall not extend where he that should have the Land after the Death of the Woman is agreeable to any such Alienation or Recovery, so that the Agreement be of Record. And forasmuch as the Heir in this Case agreed to the said Recovery and Fine, which is one of the highest Records in the Law, it seemeth that the Buyer hath Right against that Heir that agreed, and against all that shall be Heir of the Tail; and that not only by the said Recovery, but also by the said Statute, whereby the said Recovery with Assent of the Heir is affirmed.

Doct. Though the Buyer in this Case have Right during the Life of the Heir that released, yet

yet nevertheless after his Death his Heir, as it seemeth, may lawfully enter: For the Agreement whereof the Statute speaketh, must, as I suppose, either be had before the Recovery, or else at the Time of the Recovery. For if a Title by Reason of the said Statute be once devolute to the Heir in the Tail, then the Right, as me seemeth, cannot be extinct nor put away by the only Fine of the Heir, no more than if he had died and the next Heir to him had released to the Buyer by Fine, in which Case the Release could not extinct the Right of the Title, nor the Right of Entry that is given by the Statute; and so, as me seemeth, his next Heir may therefore enter.

Stud. As I perceive, all thy Doubt is in this Case, because the Assent of the Heir was after the Recovery; for if it had been at the Time of the Recovery, as if the Heir had been vouched to warrant in the same Recovery, and he had entred, and thereupon the Judgment had been given, thou agreest well, that the Recovery should have avoided the Tail for ever.

Doct. That is true, for it is in express Words of the Statute; but when the Assent is after the Recovery, then methinketh it is not so, ne that the Right of the first Tail, which was revived by the said Statute, shall not be extinct by his Fine, no more than it shall in other Tail.

Stud. I will be advised upon thy Opinion in this Matter; but yet one Thing would I move farther upon this Statute, and that is this: Some say, that by this Statute all other Recoveries that have been had over beside these Re-

Recoveries of Jointures be affirmed: For they say, that sith the Parliament, at the making of this Statute, knew well that many other Recoveries were then used and had to defeat Tails, that it was like that they would so continue, which nevertheless the Parliament did not prohibit for the Time to come, as it did the said Recoveries of Jointures; that it is therefore to suppose, that they thought that they should stand with Law and Conscience: But because Jointures were made rather for the saving of the Inheritance of the Husband than to destroy the Inheritance, they say that the Parliament thought and adjudged the Alienations and Recoveries of such Jointures to be against the Law and Conscience, and not the Alienations of other Lands entailed; for if they had, they say that the Parliament would have avoided Recoveries of tailed Lands generally, as well as it did of Recoveries of Jointures.

Doct. As to that Opinion I will answer thee thus for this Time; That though that the Makers of the said Statute only put away Recoveries of Jointures, and not other Recoveries; that yet it cannot be taken therefore that their Intent was that the other Recoveries should stand good and perfect; for they spake then only of Jointures, because there was no Complaint made in the Parliament at that Time but against Recoveries had of Jointures, and therefore it seemeth that they intended nothing concerning other Recoveries, but that they should be of the same Effect as they were before, and no otherwise. And that

that will appear more plainly thus: Though the Makers of the said Statute intended to put away and annul such Recoveries, as should be made of Jointures after a certain Day limited in the Statute, that yet they intended not to avoid ne affirm such Recoveries of Jointures as were passed before that Time; and if they intended not to avoid ne affirm the Recoveries had of Jointures before that Time, then how can it be taken that they intended to put away or affirm other Recoveries that were passed before that Time, and not of Jointures, that would not affirm, ne put away Recoveries passed of Jointures before that Time? And so, as it seemeth, they intended to spare the Multitude of them that were passed of both, and not to comfort any to take them after that Time.

Stud. I am content thy Opinion stand for this Time, and I will ask thee another Question.

CHAP. XXXII.

¶ The sixth Question of the Student, concerning tailed Lands.

If Tenant in Tail be disseised, and die, and an Ancestor collateral to the Heir in Tail release with a Warranty, and die, and the Warranty descendeth upon the Heir in the Tail; whether is he thereby barred in Conscience, as he is in the Law.

Doct. Because your principal Intent at this Time is to speak of Recoveries, and not of War-

Warranties, and also because it hath been of long Time taken for a principal Maxim of the Law, that it should be a Bar to the Heirs as well that claim by a Fee-simple as by State-tail, and for that also that it was not put away by the said Stat. of West. 2. which ordained the Tail; I will not at this Time make thee an Answer therein, but will take a Respite to be advised.

Stud. Then, I pray thee, yet, or we depart, shew me what was the most principal Cause that moved thee to move this Question of Recoveries had of tailed Lands.

Doct. This moved me thereto: I have perceived many Times that there be many and divers Opinions of these Recoveries, whether they stand with Conscience or not, and that it is to doubt that many Persons run into Offence of Conscience thereby; and therefore I thought to feel thy Mind in them, whether I could perceive that it were clear that they served to break the Tail in Law and Conscience, or that it were clearly against Conscience so to break the Tail, or that it were a Matter in Doubt: And if it appeared a Matter in Doubt, or that it appeared that the Matter were used clearly against Conscience, then I thought to do somewhat to make the Matter appear as it is, to the Intent that they that have the Rule and Charge over the People, as well the Spiritual Men as Temporal Men, should the rather endeavour them to see it reformed, for the common Wealth of the People, as well in Body as in Soul. For when any Thing is used to the Displeasure of God,

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it hurteth not only the Body, but also the Soul: And Temporal Rulers have not only Cure of the Bodies, but also of the Souls, and shall answer for them if they perish in their Default. And because it seemeth by the more apparent Reason that the Tails be not broken, ne fully avoided, by the said Recoveries, and that yet nevertheless the great Multitude of them that be passed is right much to be pondered: Therefore it were very good to prohibit them for Time to come, to put away such Ambiguities and Doubts as arise now by occasion of the said Recoveries; and so they be put as Snares to deceive the People, and so will they be as long as they be suffered to continue. And methinketh verily that it were therefore right expedient, that tailed Lands should from henceforth either be made so strong in the Law that the Tail should not be broken by Recovery, Fine with Proclamation, collateral Warranty, nor otherwise; or else that all Tails should be made Fee-simple, so that every Man that list to sell his Land may sell it by his bare Feoffment, and without any Scruple or Grudge of Conscience: And then there should not be so great Expences in the Law, nor so great Variance among the People, ne yet so great Offence of Conscience as there is now in many Persons.

Stud. Verily methinketh that thy Opinion is right good and charitable in this Behalf and that the Rulers be bound in Conscience to look upon it, to see it reformed and brought into good Order. And verily, by that

that thou hast said therein, thou hast brought me into Remembrance, that there be divers like Snares concerning Spiritual Matters suffered among the People, whereby I doubt that many Spiritual Rulers be in great Offence against God. As it is of the Point that Spiritual Men have spoke so much of, that Priests should not be put to answer before Laymen, specially of Felonies and Murders; and of the Statute of 45 E. 3. cap. 3. where it is said, that a Prohibition shall lie where a Man is sued in the Spiritual Court for Tithe of Wood that is above the Age of xx Years, by the Name of *Sylva cædua*, as it was done before; and they have in open Sermons, and in divers other open Communications and Counsels, caused it to be openly notified and known, that they should be all accursed that put Priests to answer, or that maintain the said Estatute, or any other like to it. And after, when they have right well perceived that, notwithstanding all that they have done therein, it hath been used in the same Points through all the Realm in like Manner as it was before, then they have sate still and let the Matter pass; and so when they have brought many Persons in great Danger, but most specially them that have given Credence to their saying, and yet by Reason of the old Custom have done as they did before, then there they left them. But verily it is to fear, that there is to themselves right great Offence thereby, that is to say, to see so many in so great Danger as they say they be, and to do no more to bring them out of it, than they have done for it. If it be true,

as they say, they ought to stick to it with Effect in all Charity, till it were reformed: And if it be not as they say, then they have caused many to offend that have given Credence to them, and yet contrary to their own Conscience do as they did before, and that percase should not have offended if such Sayings had not been. And so it seemeth that they have in these Matters done either too much or too little.

And I beseech Almighty God, that some good Man may so call upon all these Matters that we have now commined of, so that they that be in Authority may somewhat ponder them, and to order them in such Manner, that Offence of Conscience grow not so lightly thereby hereafter as it hath done in Times past. And verily he that on the Cross knew the Price of Man's Soul, will hereafter ask a right straight Accompt of Rulers for every Soul that is under them, and that shall perish through their Default.

Thus have I shewed unto thee, in this little Dialogue, how the Law of England is grounded upon the Law of Reason, the Law of God, the general Customs of the Realm, and upon certain Principles that be called Maxims, upon the particular Customs used in divers Cities and Countries, and upon Statutes which have been made in divers Parliaments by our Sovereign Lord the King and his Progenitors, and by the Lords Spiritual and Temporal, and all the Commons of the Realm. And I have also shewed thee in the 9th Chapter of this Book, under what Manner the said general Customs and Maxims of the Law may be proved

proved and affirmed, if they were denied: And divers other Things be contained in this present Dialogue, which will appear in the Table that is in the latter End in the Book, as to the Readers will appear. And in the End of the said Dialogue I have at thy Desire shewed thee my Conceit concerning Recoveries of tailed Lands, and thou hast upon the said Recoveries shewed me thine Opinion. And I beseech our Lord set them shortly in a good clear Way: For surely it will be right expedient for the well ordering of Conscience in many Persons, that they be so. And thus the God of Peace and Love be alway with us. Amen.

Here endeth the *First Dialogue* in *English*, with new Additions, betwixt a Doctor of Divinity and a Student in the Laws of *England*. And hereafter followeth the *Second*.

THE

THE SECOND DIALOGUE.

The Prologue.

IN the beginning of this Dialogue *the Doctor answereth to certain Questions, which the Student made to the Doctor before the making of his* Dialogue *concerning the Laws of* England *and* Conscience, *as appeareth in a Dialogue made between them in* Latin *the 24th Chap. And he answereth also divers other Questions, that the Student maketh to him in his Dialogue, of the Law of* England *and* Conscience. *And in divers other Chapters of this present Dialogue is touched shortly, how the Laws of* England *are to be observed and kept in this Realm as to temporal Things as well in Law as in Conscience, before any other Laws. And in some of the Chapters thereof is also touched, that Spiritual Judges in divers Cases be bound to give their Judgments according to the King's Law. And in the latter End of the Book the Doctor moveth divers Cases concerning the Laws of* England, *wherein he doubteth how they may stand with Conscience, whereupon the Student maketh Answer in such Manner as to the Reader will appear.*

The

The Introduction.

Stud. IN the latter end of our first Dialogue in *Latin*, I put divers Cases grounded upon the Laws of *England*, wherein I doubted, and yet do, what is to be holden therein in Conscience. But forasmuch as the Time was then far past, I shewed thee that I would not desire thee to make Answer to them forthwith at that Time, but at some better Leisure; whereunto thou saidst thou wouldest not only shew thine Opinion in these Cases, but also in such other Cases as I would put. Wherefore pray thee now (forasmuch as methinketh thou hast good Leisure) that thou wilt shew me thine Opinion therein.

Doct. I will with good-will accomplish thy Desire: But I would that when I am in Doubt what the Law of this Realm is in such Cases as thou shalt put, that thou wilt shew me what the Law is therein; for though I have by Occasion of our First Dialogue in *Latin* learned many Things of the Laws of this Realm which I knew not before, yet neverthelefs, there be many more Things that I am yet ignorant in, and that peradventure in these self Cases that thou hast put, and intendest hereafter to put; And, as I said in the First Dialogue in *Latin* the 20th Chapter, to search Conscience upon any Case of the Law it is in vain, but where the Law in the same Case is perfectly known.

Stud. I will with good-will do as thou sayest, and I intend to put divers of the same Questions that be in the last Chapter of the said Dialogue in *Latin*, and sometime I intend to alter some of them, and add some new Questions to them as I shall be most in doubt of.

Doct. I pray thee do as thou sayest, and I shall with good will either make answer to them forthwith as well as I can, or shall take longer respite to be advised, or else peradventure agree to thine Opinion therein, as I shall see Cause. But first, I would gladly know the Cause why thou hast begun this Dialogue in the *English* Tongue, and not in the *Latin* Tongue, as the first Cases that thou desiredst to know mine Opinion in, be; or in *French*, as the substance of the Law.

Stud. The Cause is this. It is right necessary to all Men in this Realm, both Spiritual and Temporal, for the good ordering of their Conscience, to know many Things of the Law of *England* that they be ignorant in. And though it had been more pleasant to them that be learned in the *Latin* Tongue to have had it in *Latin* rather than in *English*: Yet nevertheless, forasmuch as many can read *English* that understand no *Latin*, and some that cannot read *English*, by hearing it read, may learn diverse Things by it, that they should not have learned if it were in *Latin*; therefore, for the profit of the Multitude, it is put into the *English* Tongue rather than into the *Latin* or *French* Tongue. For if it had been in *French*, few should have understood it but they that be learned in the Law, and they have least need of it; forasmuch as they know the Law in the same Cases without it, and can better declare what Conscience will thereupon than they that know not the Law nothing at all. To them therefore that be not learned in the Law of the Realm this Treatise is specially made: For thou knowest well by such Studies thou hast taken to some Knowledge of the Law of the Realm, that is to them most expedient.

Doct. It is true that thou sayest, and therefore I pray thee now proceed to thy Questions.

CHAP. I.

¶ The first Question of the Student.

Stud. IF Tenant in Tail after Possibility of Issue extinct do Waste, whether doth he thereby offend in Conscience, though he be not punishable of Waste by the Law?

Doct. Is the Law clear, that he is not punishable for the Waste?

Stud. Yes verily.

Doct. And what is the Law of Tenants for Term of Life, or for Term of Years, if they do Waste?

Stud. They be punishable of Waste by the Statutes, and shall yield treble Damages: But at the Common Law before the Statute they were not punishable.

Doct. But whether thinkest thou that before the Statute they might have done Waste with Conscience, because they were not punishable by the Law?

Stud. I think not, for, as I take it, the doing of Waste of such particular Tenant for Term of Life, for Term of Years, or of Tenants in Dower, or by the Curtesy, is prohibited by the Law of Reason; for it seemeth of Reason, that when such Leases be made, or that such Titles in Dower, or by the Curtesy be given by the Law, that there is only given unto them the annual Profits of the Land, and not the Houses and Trees, and the Gravel to dig and carry away, whereby the whole Profit of them

them in the Reversion should be taken away for ever. And therefore at the Common Law, for Waste done by Tenant in Dower or Tenant by the Curtesy, there was Punishment ordained by the Law by a Prohibition of Waste, whereby they should have yielded Damages to the Value of the Waste. But against Tenant for Term of Life or for Term of Years lay no such Prohibition, for there was no Maxim in the Law therein against them, as there was against the other. And I think the Cause was, forasmuch as it was judged a Folly in the Lessor that made such a Lease for Term of Life, or for Term of Years, that at the Time of the Lease he did not prohibit them they should not do Waste; and sith he did not provide Remedy to himself, the Law would none provide. But yet I think not that the Intent of the Law was, that they might lawfully and with good Conscience do Waste; but against Tenants in Dower, and by the Curtesy the Law provided Remedy, for they had their Title by the Law.

Doct. And verily methinketh that this Tenant in Tail, as to the of doing Waste, should be like to a Tenant for Term of Life: for he shall have the Land no longer than for Term of his Life, no more than a Tenant for Term of Life shall; and the Waste of this Tenant is as great Hurt to him in the Reversion or the Remainder as is the Waste of a Tenant for Term of Life; and if he alien, the Donor shall enter for the Forfeiture, as he shall upon the Alienation of a Tenant for Term of Life; and if he make Default in a Precipe quod reddat, the Donor shall be received as he shall be upon the Default of a Tenant for

Term of Life; and therefore methinketh he shall also be punishable of Waste, as Tenant for Term of Life shall.

Stud. If he alien, the Donor shall enter, as thou sayest, because the Alienation is to his Disheritance, and therefore it is a Forfeiture of his Estate: And that is by an ancient Maxim of the Law, that giveth that Forfeiture in the self Case: And if he make Default in a Præcipe quod reddat, he in the Reversion, as thou sayest, shall be received, but that is by the Statute of Westminster 2. for at the Common Law there was no such Receit. And as for the Statute that giveth the Action of Waste against a Tenant for Term of Life, and for Term of Years, it is a Statute Penal, and shall not be taken by Equity: And so there is no Remedy given against him, neither by Common Law nor by Statute, as there is against Tenant for Term of Life; and therefore he is unpunishable of Waste by the Law.

Doct. And though he be unpunishable of Waste by the Law, yet nevertheless methinketh he may not by Conscience do that that shall be hurtful to the Inheritance after his Time, sith he hath the Land but for Term of his Life, no more than a Tenant for Term of Life may, for then he should do as he would not be done unto. For thou agreest thy self, that though a Tenant for Term of Life was not punishable of Waste before the Statute, that yet the Law judged not that he might rightfully and with good Conscience do Waste. And therefore at this Day, if a Feoffment be made to the Use of a Man for Term of Life, though there lie no Action against

him for Waste, yet he offendeth in Conscience if he do Waste, as Tenant for Term of Life did afore the Statute, when no Remedy lay against him by the Law.

Stud. That is true; but there is great Diversity between this Tenant and a Tenant for Term of Life: For this Tenant hath good Authority by the Donor to do Waste, and so hath not the Tenant for Term of Life, as it is said before; for the Estate of a Tenant in Tail after Possibility of Issue extinct is in this Manner; when Lands be given to a Man and to his Wife, and to the Heirs of their two Bodies begotten, and after the one of them dieth without Heirs of their Bodies begotten, then he or she that overliveth is called Tenant in Tail after Possibility of Issue extinct, because there can never by no Possibility be any Heir that may inherit by Force of the Gift. And thus it appeareth that the Donees at the Time of the Gift received of the Donor an Estate of Inheritance, which by Possibility might have continued for ever, whereby they had Power to cut down Trees, and to do all Things that is Waste, as Tenant in Fee-simple might. And that Authority was as strong in the Law, as if the Lessor that maketh a Lease for Term of Life say by express Words in the Lease, that the Lessee shall not be punishable of Waste. And therefore if the Donor in this Case had granted to the Donees that they should not be punishable of Waste, that Grant had been void, because it was included in the Gift before, as it should be upon a Gift in Fee-simple. And so forasmuch as by the first Gift, and by the Livery of Seisin made

upon the same, the Donees had Authority by the Donor to do Waste; therefore though that one of those Donees be now dead without Issue, so that it is certain that after the Death of the other the Land shall revert to the Donor; yet the Authority that they had by the Donor to do Waste continueth as long as the Gift, and the Livery of Seisin made upon the same continueth. And I take this to be the Reason why he shall not have in Aid, as Tenant for Term of Life shall, that is to say, for that he cannot ask help of that Maxim, whereby it is ordained that a Tenant for Term of Life shall have in Aid: For he cannot say but that he took a greater Estate by the Livery of Seisin that was made to him, which yet continueth, than for Term of Life: And so I think him not bound to make any Restitution to him in the Reversion in this Case for the Waste.

Doct. Is thy Mind only to prove that this Tenant is not bound to make Restitution to him in the Reversion for the Waste? Or that thou thinkest that he may with clear Conscience do all manner of Waste?

Stud. I intend to prove no more but that he is not bound to make Restitution to him in the Reversion.

Doct. Then I will right well agree to thine Opinion, for the Reason that thou hast made: But if thy Mind had been to have proved that he might with clear Conscience have done all Manner of Waste, I would have thought the contrary thereto, and that the Tenant in Fee-simple may not do all Manner of Waste and Destruction with Conscience, as to pull down

Houses,

Houses, and make Pastures of Cities and Towns, or to do such other acts which be against the common Wealth. And therefore some will say, that Tenant in Fee-simple may not with Conscience destroy his Woods and Coal-pits, whereby a whole Country for their Money have had Fuel; and yet though he do so, he is not bound by Conscience to make Restitution to no Person in certain. But now I pray thee, ere thou proceed to the second Case, that thou wilt somewhat shew us what thou meanest, when thou sayest, at the Common Law it was thus or thus. I understand not fully what thou meanest by that Term, at the Common Law.

Stud. I shall with good-will shew thee what I mean thereby.

CHAP. II.

What is meant by this Term, when it is said *thus it was at the Common Law.*

THE Common Law is taken three manner of Ways. First, it is taken as the Law of this Realm of England, dissevered from all other Laws. And under this Manner taken it is oftentimes argued in the Laws of England, what Matters ought of Right to be determined by the Common Law, and what by the Admiral's Court, or by the Spiritual Court: And also if an Obligation bear Date out of the Realm, as in Spain, France, or such other, it is said in the Law, and Truth it is, that they be not pleadable at the Common Law. Secondly, the Common Law

Law is taken as the King's Courts, of his Bench, or of the Common Place: And it is so taken when a Plea is removed out of Ancient Demesne, for that the Land is Frankfee, and pleadable at the Common Law, that is to say, in the King's Court, and not in Ancient Demesne. And under this Manner taken, it is oftentimes pleaded also in base Courts, as in Courts-Barons, the County, and the Court of Piepowders, and such other, this Matter or that, &c. ought not to be determined in that Court, but at the Common Law, that is to say, in the King's Courts, &c. Thirdly, by the Common Law is understood such Things as were Law before any Statute made in that Point that is in Question; so that that Point was holden for Law by the general or particular Customs and Maxims of the Realm, or by the Law of Reason, and the Law of God, no other Law added to them by Statute, nor otherwise, as is the Case before rehearsed in the first Chapter, where it is said, that at the Common Law, Tenant by the Curtesy and Tenant in Dower were punishable of Waste, that is to say, that, before any Statute of Waste made, they were punishable of Waste by the Grounds and Maxims of the Law used before the Statute made in that Point. But Tenant for Term of Life, as for Term of Years, were not punishable by the said Grounds and Maxims, till by the Statute remedy was given against them; and therefore it is said, that at the Common Law they were not punishable of Waste.

Doct. I pray thee now proceed unto the second Question.

CHAP.

CHAP. III.

¶ The second Question of the Student.

Stud. IF a Man be outlawed, and never had Knowledge of the Suit, whether may the King take all his Goods and retain them in Conscience as he may by the Law?

Doct. What is the Reason why they be forfeited by the Law in that Case?

Stud. The very Reason is, for that it is an old Custom and an old Maxim in the Law, that he that is outlawed shall forfeit his Goods to the King: And the Cause why that Maxim began was this; When a Man had done a Trespass to another, or another Offence wherefore Process of Utlawry lay, and he that the Offence was done to had taken an Action against him according to the Law, if he had absented himself, and had no Lands, there had been no Remedy against him: For, after the Law of England, no Man shall be condemned without Answer, or that he appear and will not answer, except it be by Reason of any Statute. Therefore, for the Punishment of such Offenders as will not appear to make Answer, and to be justified in the King's Courts, hath been used, without [illegible] of Mind, that an Attachment in that Case should be directed against him returnable in the King's Bench or the Common Place: And if it were returned thereupon, that he had nought whereby he might be attached,

that then should go forth a Capias to take his Person, and after an Alias Capias, and then a Pluries: And if it were returned upon every of the said Capias that he could not be found, and he appeared not, then should an Exigent be directed against him, which should have so long a Day of Return, that five Counties might be holden before the Return thereof, and in every of the said five Counties the Defendant to be solemnly called, and if he appeareth not, then, for his Contumacy and Disobedience of the Law, the Coroners to give Judgment that he shall be outlawed, whereby he shall forfeit his Goods to the King, and lose divers other Advantages in the Law, that needeth not here to be remembred now. And so because he was in this Case called according to the Law, and appeared not, it seemeth that the King hath good Title to the Goods both in Law and Conscience.

Doct. If he had Knowledge of the Suit in every County, it seemeth the King hath good Title in Conscience, as thou sayest. But if he had no Knowledge thereof, it seemeth not so; for the Default that is adjudged in him (as appeareth by thine own Reason) is his Contumacy and Disobedience of the Law, and if he were ignorant of the Suit, then there can be assigned to him no Disobedience, for a Disobedience implieth a Knowledge of that he should have obeyed unto.

Stud. It seemeth in this Case that he should be compelled to take Knowledge of the Suit at his Peril: For sith he hath attempted to offend the Law, it seemeth Reason that he shall be com-

compelled to take heed what the Law will do against him for it; and not only that, but that he should rather offer amends for his Trespass, than to tarry till he were sued for it. And so it seemeth the Ignorance of the Suit is of his own Default, specially sith in the Law is set such Order that every Man may know, if he will, what Suit is taken against him, and may see the Records thereof when he will: And so it seemeth that neither the Party nor the Law be not bounden to give him no Knowledge therein. And over this I would somewhat move farther in this Matter thus: That though that Action were untrue, and the Defendant not guilty, that yet the Goods be forfeited to the King, for his not Appearance, in Law, and also in Conscience, and that for this Cause: The King, as Sovereign and Head of the Law, is bounden of Justice to grant such Writs and such Processes as be appointed in the Law to every Person that will complain, be his Surmise true or false; and thereupon the King (of Justice) oweth as well to make Process to bring the Defendant to answer when he is not guilty, as when he is guilty: And then when there is a Maxim in the Law, that if a Man be outlawed, in such Manner as before appeareth, that he shall forfeit all his Goods to the King, and maketh no Exception whether the Action be true or untrue, it seemeth that the said Maxim more regardeth the general Ministration of Justice, than the particular Right of the Party; and therefore the Property by the Outlawry, and by the said Maxim ordained for Ministration of Justice,

ty is altered, and is given to the King, as before appeareth, and that both in Law and in Conscience, as well as if the Action were true: And then the Party that is so outlawed is driven to sue for his Remedy against him that hath so caused him to be outlawed upon an untrue Action.

Doct. If he have not sufficient to make Recompence, or die before Recovery can be had, what Remedy is had then?

Stud. I think no Remedy: And for a farther Declaration in this Case, and in such other like Cases, where the Property of Goods may be altered without Consent of the Owner, it is to consider, that the Property of Goods is not given to the Owners directly by the Law of Reason, nor by the Law of God, but by the Law of Man, and is suffered by the Law of Reason and by the Law of God so to be. For at the Beginning all Goods were in Common, but after they were brought by the Law of Man into a certain Property, so that every Man might know his Own: And then when such Property is given by the Law of Man, the same Law may assign such Conditions upon the Property as it listeth, so they be not against the Law of God, ne the Law of Reason, and may lawfully take away that it giveth, and appoint how long the Property shall continue. And one Condition that goeth with every Property in this Realm, is, If he that hath the Property be outlawed according to such Process as is ordained by the Law, that he shall forfeit the Property unto the King. And divers other Cases there be also, whereby

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Property in Goods shall be altered in the Law, and the Right in Lands also, without Assent of the Owner, whereof I shall shortly touch some without saying any Authority therein, for the more Shortness. First, by a Sale in open Market the Property is altered. Also Goods stollen and seised for the King, or waived, be forfeit, unless Appeal or Indictment be sued. Also Strays, if they be proclaimed, and be not after claimed by the Owner within the Year, be forfeit; and also a Deodand is forfeit (to whomsoever the Property was before, except it belonged to the King) and shall be disposed for the Soul of him that was slain therewith; and a Fine with a Nonclaim at the Common Law was a Bar, if Claim were not made within a Year, as it is now by Statute, if the Claim be not made within five Years. And all these Forfeitures were ordained by the Law upon certain Considerations, which I omit at this Time: But certain it is that none of them were made upon a better Consideration than this Forfeiture of Utlagary was. For if no especial Punishment should have been ordained for Offenders that would absent themselves, and not appear when they were sued in the King's Courts, many Suits in the King's Courts should have been of small Effect. And sith this Maxim was ordained for the Execution of Justice; and as much done therein by the Common Law as Policy of Man could reasonably devise, to make the Party have Knowledge of the Suit; and now is added thereto by the Stat. made the 6th Year of H. 8. that a Writ of Proclamation shall be sued, if

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the Party be dwelling in another Shire: It seemeth that such Title as is given to the King thereby, is good in Conscience, especially seeing that the King is bound to make Process upon the Surmise of the Plaintiff, and may not examine, but by Plea of the Party, whether the Surmise be true or not. But if the Party be returned five Times called, where indeed he was never called, (as in the second Case of the last Chapter of the said Dialogue in Latin is contained) then it seemeth the Party shall have good Remedy by Petition to the King, specially if he that made the Return be not sufficient to make Recompence, or die before Recovery can be had.

Doct. Now sith I have heard thine Opinion in this Case, whereby it appeareth that many Things must be seen, or a full and plain Declaration can be made in this Behalf, and seeing also that the plain Answer to this Case shall give a great Light to divers other Cases that may come by such Forfeiture: I pray thee give me a farther Respite ere that I shew thee my full Opinion therein, and hereafter I shall right gladly do it. And therefore I pray thee proceed now to some other Case.

CHAP. IV.

¶ The third Question of the Student.

Stud. IF a Stranger do Waste in Lands that another holdeth for Term of Life, without Assent of the Tenant for Term of Life, whether may he in the Reversion recover treble Damages

mages and the Place wasted against the Tenant for Term of Life, according to the Statute, in Conscience, as he may by the Law, if the Stranger be not sufficient to make Recompence for the Waste done?

Doct. Is the Law clear in this Case, that he in the Reversion shall recover against the Tenant for Term of Life, though that he assented not to the doing of Waste?

Stud. Yea verily; and yet if the Tenant for Term of Life had been bounden in an Obligation in a certain Sum of Money that he should do no Waste, he should not forfeit his Bond by Waste of a Stranger. And the Diversity is this. It hath been used as an ancient Maxim in the Law, that Tenant by the Curtesy and Tenant in Dower should take the Land with this Charge, that is to say, that they should do no Waste themselves, nor suffer none to be done: And when an Action of Waste was given after against a Tenant for Term of Life, then he was taken to be in the same Case, as to the Point of Waste, as Tenant by the Curtesy and Tenant in Dower was, that is to say, that he should do no Waste, nor suffer none to be done; for there is another Maxim in the Law of England, that all Cases like unto other Cases shall be judged after the same Law as other Cases be: And sith no Reason of Diversity can be assigned why the Tenant for Term of Life, after an Action of Waste was given against him, should have any more Favour in the Law than the Tenant by the Curtesy or Tenant in Dower should; therefore he is put under the same Maxim as they be, that

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is to say, that he shall do no Waste, ne suffer none to be done. And so it seemeth that the Law in this Case doth not consider the Ability of the Person that doth the Waste, whether he be able to make Recompence for the Waste or not, but the Assent of the said Tenants, whereby they have wilfully taken upon them the Charge to see that no Waste shall be done.

Doct. I have heard that if Houses of these Tenants be destroyed with sudden Tempest, or with strange Enemies, that they shall not be charged with Waste.

Stud. Truth it is.

Doct. And I think the Reason is, because they can have no Recovery over.

Stud. I take not that for the Reason, but that it is an old reasonable Maxim in the Law, that they should be discharged in these Cases. Howbeit some will say, that in these Cases the Law of Reason doth discharge them: And therefore they say, that if a Statute were made that they should be charged in these Cases of Waste, that the Statute were against Reason, and not to be observed. But yet nevertheless I take it not so; for they might refuse to take such Estate if they would, and if they will take the Estate after the Law made, it seemeth reasonable that they take it with the Charge, and with the Condition that is appointed thereto by the Law, though Hurt might follow to them afterward thereby. For it is oftentimes seen in the Law, that the Law doth suffer him to have Hurt without Help of the Law that will wilfully run into it of his own Act, not compelled thereto, and judgeth it his Folly so to run into it; for which Folly he shall

shall also be many Times without Remedy in Conscience. As if a Man take Land for Term of Life, and bindeth himself by Obligation that he shall leave the Land in as good Case as he found it; if the Houses be after blown down with Tempest, or destroyed with strange Enemies, as in the Case that thou hast put before, he shall be bound to repair them, or else he shall forfeit his Obligation in Law and Conscience: Because it is his own Act to bind him to it, and yet the Law would not have bound him thereto, as thou hast said before. So methinketh that the Cause why the said Tenants be discharged in the Law in an Action of Waste, when the Houses be destroyed by sudden Tempest, or by strange Enemies, is by a special reasonable Maxim in the Law, whereby they be excepted from the other general Bond before rehearsed, that is to say, they shall at their Peril see that no Waste shall be done, and not by the Law of Reason: And sith there is no Maxim in this Case to help this Tenant, ne that he cannot be holpen by the Law of Reason, it seemeth that he shall be charged in this Case by his own Act both in Law and Conscience, whether the Stranger be able to recompence him or not.

Doct. I Doubt in this Case whether the Maxim that thou speakest of be reasonable or not, that is to say, that Tenants by the Curtesy, and Tenants in Dower were bound by the Common Law, that they should do no Waste themselves, and over that at their Peril to see that no Waste should be done by none other. For that Law seemeth not reasonable that bindeth a

Man

Man to an impossibility: And it is impossible to prevent that no Waste shall be done by Strangers; for it may be suddenly done in the Night, that the Tenants can have no Notice of, or by great Power, that they be not able to resist: And therefore me thinketh they ought not to be charged in those Cases for the Waste without they may have good Remedy over; and then peradventure the said Maxim were sufferable, and else methinketh it is a Maxim against Reason.

Stud. As I have said before, no Man shall be compelled to take the Bond upon him, but he that will take the Land; and if he will take the Land, it is reason he take the Charge, as the Law hath appointed it: And then if any Hurt grow to him thereby, it is through his own Act, and his own Assent, for he might have refused the Lease if he would.

Doct. Though a Man may refuse to take Estate for Term of Life, or for Term of Years, and a Woman may refuse to take her Dower; yet Tenant by the Curtesy cannot refuse to take his Estate, for immediately after the Death of his Wife the Possession abideth still in him by the Act of the Law, without Entry: And then I put the Case, that after the Death of his Wife he would waive the Possession, and after Waste were done by a Stranger, whether thinkest thou that he should answer to the Waste?

Stud. I think he should by the Law.

Doct. And how standeth that with Reason, seeing there is no Default in him?

Stud. It was his Default, and at his own Peril that he would marry an Inheritrix, whereupon such Danger might follow.

Doct.

Doct. I put the Case that he were within Age at the Marriage, or that the Land descended to his Wife after he married her.

Stud. There thou movest a farther Doubt than the first Question is: And though it were as thou sayest, yet thou canst not say but that there is as great Default in him as in him in the Reversion; and that there is as great Reason why he should be charged with the Waste, as that he in the Reversion should be disherited, and have no Manner of Remedy, ne yet no Profit of the Land, as the other hath. And though the said Maxim may be thought very straight to the said Tenants; yet it is to be favoured as much as may be reasonably, because it helpeth much the common Wealth; for it hurteth the common Wealth greatly when Woods and Houses be destroyed; and if they should answer for no Waste, but for Waste done by themselves, there might be Wastes done by Strangers by Commandment or Assent, in such colourable Manner, that they in the Reversion should never have Proof of their Assent.

Doct. I am content thine Opinion stand for this Time, and I pray thee now proceed to another Question.

CHAP. V.

¶ The fourth Question of the Student.

Stud. If he that is the very Heir be certified by the Ordinary, Bastard, and after bring an Action as Heir against another Person:

son: Whether may any Man knowing the Truth be of Counsel with the Tenant, and plead the said Certificate against the Defendant by Conscience or not?

Doct. Is the Law in this Case, that all other against whom the Defendant hath Title shall take Advantage of this Certificate, as well as he at whose Suit he is certified Bastard?

Stud. Yea verily, and that for two Causes, whereof the one is this. There is an old Maxim in the Law, that a Mischief shall be rather suffered than an Inconvenience: And then in this Case if another Writ should afterward be sent to another Bishop in another Action, to certify whether he were a Bastard or not; peradventure the Bishop would certify that he were mulier, that is to say, lawfully begotten, and then he should recover as Heir; and so he should in one self Court be taken as mulier and Bastard. For avoiding of which contrariosity, the Law will suffer no more Writs to go forth in that Case, and suffereth also all Men to take Advantage of the Certificate, rather than to suffer such a Contradiction in the Court, which in the Law is called an Inconvenience. And the other Cause is, because this Certificate of the Bishop is the highest Trial that is in the Law in this Behalf: But this is not understood but where Bastardy is laid in one that is Party to the Writ, for if Bastardy be laid in one that is a Stranger to the Writ, as if Vouchee pray in Aid or such other, then that Bastardy shall be tried by xii Men, by which Trial he in whom the Bastardy is laid shall not be concluded, because he is not privy to the Trial, and may have no Attaint; but he that is

is Party to the Issue may have Attaint, and therefore he shall be concluded, and none other but he. And forasmuch as the said Maxim was ordained to eschew an Inconvenience, (as before appeareth) it seemeth that every Man learned may with Conscience plead the said Certificate for avoiding thereof, and give Counsel therein to the Party according unto the Law, or else the said Inconvenience must needs follow. But yet nevertheless I do not mean thereby, that the Party may after, when he hath barred the Demandant by the said Certificate, retain the Land in Conscience by Reason of the said Certificate: For though there be no Law to compel him to restore it, yet I think well that he in Conscience is bound to restore it, if he knew that the Demandant is the very true Heir, whereof I have put divers Cases like in the xvii Chapter of our first Dialogue in Latin. But my Intent is, that a Man learned in the Law, in this Case and other like, may with Conscience give his Counsel according to the Law, in avoiding of such Things as the Law thinketh should for a reasonable Cause be eschewed.

Doct. Though he that doth not know whether he be a Bastard or not may give his Counsel, and also plead the said Certificate; yet I think that he that doth know himself to be the very true Heir may not plead it: And that is for two Causes, whereof the one is this: Every Man is bound by the Law of Reason to do as he would be done to: But I think that if he that pleadeth that Certificate were in like Case, he would think that no Man, knowing the Certificate to be untrue, might

with Conscience plead it against him, wherefore no more may he plead it against none other. The other Cause is this; although the Certificate be pleaded, yet is the Tenant bounden in Conscience to make Restitution thereof, as thou hast said thy self; and then in Case that he would not make Restitution, then he that pleadeth the Plea should run thereby in like Offence, for he hath holpen to set the other Man in such a Liberty, that he may chuse whether he will restore the Land or not; and so he should put himself to jeopardy of another Man's Conscience. And it is written Eccl. 3. Qui amat periculum peribit in illo, that is, He that wilfully will put himself in jeopardy to offend, shall perish therein. And therefore it is the surest Way to eschew Perils, for him that knoweth that he is Heir, not to plead it. And as for the Inconvenience that thou sayest must needs follow, but the Certificate be pleaded; as to that it may be answered, that it may be pleaded by some other that knoweth not that he is very Heir: And if the Case be so far put, that there is none other learned there but he, then methinketh that he shall rather suffer the said Inconvenience, than to hurt his own Conscience: For alway Charity beginneth at himself, and so every Man ought to suffer all other Offences rather than himself would offend. And now that thou knowest mine Opinion in this Case, I pray thee proceed to another Question.

CHAP.

CHAP. VI.

¶ The fifth Question of the Student.

Stud. WHether may a Man with Conscience be of Counsel with the Plaintiff in an Action at the Common Law, knowing that the Defendant hath sufficient Matter in Conscience whereby he may be discharged by a Subpœna in the Chancery, which he cannot plead at the Common Law, or not?

Doct. I pray thee put a Case thereof in certain, for else the Question is very general.

Stud. I will put the same Case that thou puttest in our first Dialogue in Latin, the xth Chap. that is to say, If a Man bound in an Obligation pay the Money, and taketh no Acquittance, so that by the Common Law he shall be compelled to pay the Money again, for such Consideration as appeareth in the xvth Chapter of the said Dialogue, where it is shewed evidently how the Law in that Case is made upon a good reasonable Ground, much necessary for all the People, howbeit that a Man may sometime through his own Default take Hurt thereby; herein I pray thee shew me thine Opinion.

Doct. This Case seemeth to be like to the Case that thou hast next before this, and that he that knoweth the Payment to be made doth not as he would be done to, if he give Counsel that an Action should be taken to have it payed again.

Stud. If he be sworn to give Counsel according to the Law, as Serjeants at the Law be,

be, it ſeemeth he is bound to give Counſel according to the Law, for elſe he ſhould not perform his Oath.

Doct. In theſe words (according to the Law) is underſtood the Law of God and the Law of Reaſon, as well as the Law and Cuſtoms of the Realm: For as thou haſt ſaid thy ſelf, in our firſt Dialogue in Latin, that the Law of God and the Law of Reaſon be two ſpecial Grounds of the Laws of England, wherefore (as methinketh) he may give no Counſel (ſaving his Oath) neither againſt the Law of God nor the Law of Reaſon. And certain it is, that this Article, that is to ſay, that a Man ſhall do as he would be done to, is grounded upon both the ſaid Laws. And firſt that it is grounded upon the Law of Reaſon, it is evident of it ſelf. And in the 6th Chapter of St. Luke it is ſaid, Et prout vultis ut faciant vobis homines, & vos facite illis ſimiliter; that is to ſay, All that other Men ſhould do to you, do you to them: And ſo it is grounded upon the Law of God. Wherefore if he ſhould give Counſel againſt the Defendant in that Caſe, he ſhould do againſt both the ſaid Laws.

Stud. If the Defendant had no other Remedy but the Common Law, I would agree well it were as thou ſayeſt, but in this Caſe he may have good Remedy by a Subpœna: And this is the Way that ſhall induce him directly to his Subpœna, that is to ſay, when it appeareth that the Plaintiff ſhall recover by Law.

Doct. Though the Defendant may be diſcharged by Subpœna, yet the bringing in of his Proofs there will be to the Charge of

the Defendant, and also the Proofs may die or they come in. Also there is a Ground in the Law of Reason, Quod nihil possimus contra veritatem (that is) We may do nothing against the Truth; and sith he knoweth it is truth that the Money is paid, he may do nothing against the Truth; and if he should be of Counsel with the Plaintiff, he must suppose and aver that it is the very due Debt of the Plaintiff, and that the Defendant with-holdeth it from him unlawfully, which he knoweth himself to be untrue: Wherefore he may not with Conscience in this Case be of Counsel with the Plaintiff, knowing that the Plaintiff is paid already. Wherefore if thou be contented with this Answer, I pray thee proceed to some other Question.

Stud. I will with good-will.

CHAP. VII.

¶ The sixth Question of the Student.

A Man maketh a Feoffment to the Use of him and of his Heirs, and after the Feoffor putteth in his Beasts to manure the Ground, and the Feoffee taketh them as Damage-feasant, and putteth them in Pound, and the Feoffor bringeth an Action of Trespass against him for entring into his Ground, &c. Whether may any Man, knowing the said Use, be of Counsel with the Feoffee to avoid the Action?

Doct. May he by the Common Law avoid that Action, seeing that the Feoffor ought in Conscience to have the Profits?

Stud. Yes, verily; for as to the Common Law the whole Interest is in the Feoffee, and if the Feoffee will break his Conscience, and take the Profits, the Feoffor hath no Remedy by the Common Law, but is driven in that Case to sue for his Remedy by Subpœna for the Profits, and to cause him to enfeoff him again: And that was sometime the most common Case where the Subpœna was sued, that is to say, before the Statute of R. 3. but sith the Statute, the Feoffor may lawfully make a Feoffment. But nevertheless, for the Profits received, the Feoffor hath yet no Remedy but by Subpœna as he had before the said Statute. And so the Supposal of this Action of Trespass is untrue in every Point as to the Common Law.

Doct. Though the Action be untrue as to the Law, yet he that sueth it ought in Conscience to have that he demandeth by the Action, that is to say, Damages for his Profits; and as it seemeth, no Man may with Conscience give Counsel against that he knoweth Conscience would have done.

Stud. Though Conscience would he should have the Profits, yet Conscience will not that for the attaining thereof the Feoffor should make an untrue Surmise. Therefore against the untrue Surmise every Man may with Conscience give his Counsel; for in that doing he resisteth not the Plaintiff to have the Profits, but he withstandeth him that he should not maintain an untrue Action for the Profits. And it sufficeth not in the Law, ne yet in Conscience, as me seemeth, that a Man have Right to that he sueth for, but that also he sue by a just Means, and that he

have

have both good Right, and also a good and a true Conveyance to come to his Right. For if a Man have a Right to Lands as Heir to his Father, and he will bring an Action as Heir to his Mother, that never had Right, every Man may give Counsel against the Action, though he know he have Right by another Means: And so, as methinketh, he may do in Dilatories, whereby the Party may take hurt if it were not pleaded, though he know the Plaintiff have Right; as if the Party or the Town be misnamed, or if the Degrees in Writs of Entry be mistaken: But if the Party should take no hurt by admitting of a Dilatory, there he that knoweth that the Plaintiff hath Right, may not plead that Dilatory with Conscience. As in a Formedon to plead in Abatement of the Writ, because he hath not made himself Heir to him that was the last seised; or in a Writ of Right, for that the Demandant had omitted one that tended Right, ne such other. Ne he may not assent to the casting of an Essoin nor Protection for him, if he know that the Demandant hath Right: Ne he may not vouch for him, except it be that he knoweth that the Tenant hath a true Cause of a Voucher and of Lien, and that he doth it to bring him thereto. And in like wise he may not pray in Aid for him, unless he know the Prayee have good Cause of Voucher and lien over; or that he knew that the Prayee hath somewhat to plead that the Tenant may not plead, as Villeinage in the Demandant, or such other.

Doct. Though the Plaintiff hath brought an Action that is untrue, and not maintainable in the Law, yet the Defendant doth wrong to the Plaintiff in the with-holding of the Profits as well before the Action brought, as hanging the Action; and that Wrong, as it seemeth, the Counsellor doth maintain, and also sheweth himself to favour the Party in that Wrong, when he giveth Counsel against the Action.

Stud. If the Plaintiff do take that for a favour and a maintenance of his Wrong, he judgeth farther than the Cause is given, so that the Counsellor do no more but give Counsel against the Action: For though he give him Counsel to withstand the Action for the untruth of it, and that he should not confess it, and to make thereby a Fine to the King without Cause; yet it may not stand with Reason that he may give Counsel to the Party to yield the Profits. And therefore I think he may in this Case be of Counsel with him at the Common Law, and be against him in Chancery, and in either Court give his Counsel, without any contrariety or hurt of Conscience. And upon this Ground it is, that a Man may with good Conscience be of Counsel with him that hath Land by Discent, or by a Discontinuance without Title, if he that hath the Right bring not his Action according to the Law, for the recovering of his Right in that behalf.

CHAP. VIII.

¶ The seventh Question of the Student.

If a Man take Distress for Debt upon an Obligation, or upon a Contract, or such other Thing that he hath right Title to have, but that he ought not by the Law to distrain for it, and nevertheless he keepeth the same Distress in Pound till he be paid of his Duty, what Restitution is he bound to make in this Case? Whether shall he repay the Money, because he is come to it by an unlawful Means, or only restore the Party for the wrongful taking of the Distress, or for neither? I pray you shew me.

Doct. What is the Law in this Case.

Stud. That he that is distrained may bring a Special Action of Trespass against him that distrained, for that he took his Beasts wrongfully, and kept them till he made a Fine; and therefore he shall recover the Fine in Damages, as he shall do for the Residue of Trespass: For the taking of the Money by such Compulsion, is taken in the Law but as a Fine wrongfully taken, though it be his Duty to have it.

Doct. Yet though he may so recover, methinketh that as to the Repayment of the Money, he is not bound thereto in Conscience, so that he take no more than of Right he ought to have: For though he came to it by unjust Means, yet when the Money is paid him, it is his of Right, and he is not bound to repay it,

unless it be recovered as thou said'st; and then when he hath repayed it, he is, as methinketh, restored to his first Action. But to the Redelivery of the Beasts with such Damages and such Hurt as he hath by the Distress, I suppose he is bound to make Recompence of them in Conscience without Compulsion or Suit in the Law: For though he might lawfully have sued for his Duty in such Manner as the Law hath ordered; yet I agree well that he may not take upon him to be his own Judge, and to come to his Duty against the Order of the Law. And therefore if any hurt come to the Party by the Disorder, he is bound to restore it. But I would think it were the more Doubt, if a Man took such a Distress for a Trespass done to him, and keepeth the Distress till Amends be made for the Trespass: For in that Case the Damages be not in Certain, but be arbitrable either by the Assent of the Parties, or by 12 Men. And it seemeth that there is no Assent of the Party in this Case, specially no free Assent, for that he doth is by Compulsion, and to have his Distress again, and so his Assent is not much to be pondered in that Case, for all his Assessing of him that took the Distress, and so he hath made himself his own Judge, and that is prohibited in all Laws: But in that Case where the Distress is taken for Debt, he is not his own Judge; for the Debt was judged in certain before the first Contract, and therefore some think great Diversity betwixt the Cases.

Stud.

Stud. By that Reason it seemeth, That if he that distraineth in the first Case for the Debt take any thing for his Damages, that he is bound in Conscience to restore it again; for Damages be arbitrable, and not certain, no more than Trespass is; and me seemeth that both in the Case of Trespass and Debt, he is bound in Conscience to restore that he taketh: For, though he ought in Right to have like Sum as he receiveth, yet he ought not to have the Money that he receiveth, for he came to the Money by an unjust Means; wherefore it seemeth he ought to restore it again.

Doct. And if he should be compelled to restore it again, should he not yet (for that he received it once) be barred of his first Action notwithstanding the Payment?

Stud. I will not at this Time clearly assoil thee that Question; but this I will say, That if any Hurt come to him thereby, it is through his own Default, for that he would do against the Law: But nevertheless a little I will say to thy Question, that, as me seemeth, when he hath repayed the Money, that he is restored to his first Action. As if a Man condemned in an Action of Trespass pay the Money, and after the Defendant reverse the Judgment by a Writ of Error, and have his Money repaid, then the Plaintiff is restored to his first Action. And therefore if he that in this Case took the Money, restore that he took by the wrongful Distress, or that he ordered the Matter so liberally that the other murmur not, ne complain not at it, me seemeth he did very well to be sure in Conscience: And therefore I would advise every Man to be

well aware how he distraineth in such Case against the Law.

Doct. Thy Counsel is good, and I note much in this Case, That the Party may have an Action of Trespass against him that distraineth, so that he is taken in the Law but as a Wrong-doer; and therefore to pay the Money again is the sure way, as thou hast said before. And I pray thee now shew me for what a Man may lawfully distrain, as thou thinkest.

CHAP. IX.

¶ For what Things a Man may lawfully distrain.

Stud. A Man may lawfully distrain for a Rent-service, and for all Manner of Services, as Homage, Fealty, Escuage, Suit of Court, Reliefs, and such other. Also for a Rent reserved upon a Gift in Tail, a Lease for Term of Life, for Years, or at Will, if he reserve the Reversion, the Feoffor shall distrain of common Right, though there be no Distress spoken of. But in Case a Man make a Feoffment, and that in Fee by Indenture, reserving a Rent, he shall not distrain for that Rent, unless a Distress be expressly reserved: And if the Feoffment be made without a Deed reserving a Rent, that Reservation is void in Law, and he shall have the Rent only in Conscience, and shall not distrain for it. And like Law is where a Gift in Tail, or a Lease for Term of Life is made, the Remainder over in Fee, reserving a Rent, that Reservation is void in the Law.

Also if a Man seised of Land for Term of Life granteth away his whole Estate, reserving a Rent, that Reservation is void in the Law, without it be by Indenture; and if it be by Indenture, yet he shall not distrain for the Rent, but a Distress be reserved. And for Amerciaments in a Leet the Lord shall distrain; but for Amerciaments in a Court-Baron he shall not distrain.

Also if a Man make a Lease at Michaelmas for a Year, reserving Rent payable at the Feasts of the Annunciation of our Lady and Saint Michael the Archangel; in that Case he shall distrain for the Rent due at our Lady-day, but not for the Rent due at Michaelmas, because the Term is expired.

But if a Man make a Lease at the Feast of Christmas, for to endure to the Feast of Christmas next following, that is to say, for a Year, reserving a Rent at the aforesaid Feasts of the Annunciation of our Lady and Saint Michael the Archangel; there he shall distrain for both the Rents as long as the Term continued, that is to say, till that aforesaid Feast of Christmas.

And if a Man hath Land for Term of Life of John at Noke, and maketh a Lease for Term of Years, reserving a Rent, the Rent is behind, and John at Noke dieth; there he shall not distrain, because his Reversion is determined.

Also if he to whose Use Feoffees been seised maketh a Lease for Term of Years, or for Term of Life, or a Gift in Tail reserving a Rent; there the Reservation is good, and the Lessor shall distrain.

And if a Township be amerced, and the Neighbours by Assent assess a certain Sum upon every Inhabitant, and agree that if it be not paid by such a Day, that certain Persons thereto assigned shall distrain; in this Case the Distress is lawful. If Lord and Tenant be, and if the Tenant do hold of the Lord by Fealty and Rent, and the Lord doth grant away the Fealty, reserving the Rent, and the Tenant atturneth; in this Case he that was Lord may not distrain for the Rent, for it is become a Rent-seck. But if a Man make a Gift in Tail to another, reserving Fealty and certain Rent, and after that he granteth away the Fealty, reserving the Rent and the Reversion to himself; in this Case he shall distrain for the Rent, for the Grant of the Fealty is void, for the Fealty cannot be severed from the Reversion. Also for Heriot-service the Lord shall distrain; and for Heriot-custom he shall seise, and not distrain. Also if Rent be assigned to make a Partition or Assignment of Dower legal, he or she to whom the Rent is assigned may distrain. And in all these Cases above-said, where a Man may distrain, he may not distrain in the Night, but for Damage-feasant; that is to say, where Beasts do Hurt in his Ground, he may distrain in the Night. Also for Wastes, for Reparations, for Accompts, for Debts upon Contracts, or such other, no Man may lawfully distrain.

CHAP.

CHAP. X.

¶ The eighth Question of the Student.

IF a Man do a Trespass, and after make his Executors, and die before any Amends made; whether be his Executors bound in Conscience to make Amends for the Trespass, if they have sufficient Goods thereto, though there be no Remedy against them by the Law to compel them to it?

Doct. It is no doubt but they are bound thereto in Conscience, before any other Deed in Charity that they may do for him of their own Devotion.

Stud. Then would I wit, if the Testator made Legacies by his Will, whether the Executors be bound to do first, that is to say, to make Amends for the Trespass, or to pay the Legacies, in case they have no Goods to do both?

Doct. To pay Legacies: For if they should first make Recompence for the Trespass, and then have not sufficient to pay the Legacies; they should be taken in the Law as Wasters of their Testator's Goods; for they were not compellable by no Law to make Amends for the Trespass, because every Trespass dieth with the Person; but the Legacies they should be compelled by the Law Spiritual to fulfil, and so they should be compelled to pay the Legacies of their own Goods, and they shall not be compelled thereto by no Law ne Conscience: but if the Case were, that he leave sufficient Goods to do both, then methinketh they be bound

bound to do both, and that they be bound to make Amends for the Trespass, before they may do any other charitable Deed for the Testator of their own Mind, as I have said before, except the Funeral expences that be necessary, which must be allowed before all other Things.

Stud. And what the proving of the Testament?

Doct. The Ordinary may nothing take by Conscience therefore, if there be not sufficient Goods besides for the Funerals, to pay the Debts, and to make Restitution. And in like wise the Executors be bound to pay Debts upon a simple Contract, before any other Deed of Charity that they may do for the Testator of their own Devotion, though they shall not be compelled thereto by the Law.

Stud. And whether thinkest thou that they be bound to do first, that is to say, to make Amends for the Trespass, or to pay the Debts upon a simple Contract?

Doct. To pay the Debts, for that is certain, and the Trespass is arbitrable.

Stud. Then, for the plainer Declaration of this Matter and other like, I pray thee shew me thy Mind, by what Law it is, that if a Man make Executors, that the Executors, if they take upon them, be bound to perform the Will, and dispose the Goods that remain for the Testator?

Doct. I think that it is best by the Law of Reason.

Stud.

Stud. And methinketh that it should be rather by the Custom of the Realm.

Doct. In all Countries, and in all Lands they make Executors.

Stud. That seemeth to be rather by a general Custom, after that the Law and Custom of Property was brought in, than by the Law of Reason: For as long as all things were in common, there were no Executors ne Wills, ne they needed not them; and when Property was after brought in, methinketh that yet making of Executors and disposing of Goods by Will, after a Man's Death, followeth not necessarily thereupon: for it might have been made for a Law, that a Man should have had the Property of his Goods only during his Life, and that then, his Debts paid, all his Goods to have been left to his Wife and Children, or next of his Kin, without any Legacies making thereof; and so it might now be ordained by Statute, and the Statute good, and not against Reason. Wherefore it appeareth that Executors have no Authority by the Law of Reason, but by the Law of Man. And by the old Law and Custom of the Realm a Man may make Executors, and dispose his Goods by his Will, and then his Executors shall have the Execution thereof, and his Heirs shall have nothing, but if any particular Custom help: And the Executors shall also have the whole Possession and Disposition of all his Goods and Chattels, as well real as personal, though no word be expressly spoken in the Will that they shall have them: And they shall have also Actions to recover all Debts due to the Testator, though all Debts

and

and Legacies of the Testator be paid before, and shall have the Disposition of them to the Use of the Testator, and not to their own Use. And so methinketh that the Authority to make Executors, and that they shall dispose the Goods for the Testator, is by the Custom of this Realm: But then, I think, as thou sayest, that by the Law of God they shall be bound to do the first, that is, to the most Profit of the Soul of their Testator, where the Disposition thereof is left to their Discretion; and that, I agree well, is to pay Debts upon Contracts, and to make amends for wrong done by the Testator, though they be not compelled thereto by the Law and Custom of the Realm, if there be none other Debt nor Legacy that they be bound to pay by the Law: But if two several Debts be payable by the Law, then which Debt they shall do first in Conscience, I am somewhat in doubt.

Doct. Let us first know what the Common Law is therein.

Stud. The Common Law is, That if the Testator owe 10 l. to two Men severally by Obligation, or by such other Manner that an Action lieth against his Executors thereof by the Law, and he leaveth Goods to pay the one, and not both; that in that Case he that can first obtain his Judgment against the Executors, shall have Execution of the whole, and the other shall have nothing: But to which of them he shall in Conscience owe his Favour, the Common Law teacheth not.

Doct. Therein must be considered the Cause why the Debts began, and then he must after Conscience bear his lawful Favour to him that hath the clearest Cause of Debt; and if both have

have like Cause, then in Conscience he must bear his Favour where is most need and greatest Charity.

Stud. May the Executors in that Case delay that Action that is first taken, if it stand not with so good Conscience to be paid as another Debt whereof no Action is brought, and procure that an Action may be brought thereof, and then to confess that Action, that he may so have Execution, and then the Executors to be discharged against the other?

Doct. Why may he not in that Case pay the other without Action, and so be discharged in the Law against the first?

Stud. No verily, for after an Action is taken, the Executor may not minister the Goods so, but that he leave so much as shall pay the Debt whereof the Action is taken: And if he do not, he shall pay it of his own Goods, except another recover and have Judgment against him hanging that Action, and that without Covin.

Doct. Then to answer to thy Question, I think, that by Delays that be lawful, as by Essoin, Imparlance, or by dilatory Plea in Abatement of the Writ that is true, he may delay it: But he may plead no untrue Plea to prefer the other to his duty. But, I pray thee, what is the Law of Legacies, Restitution, and Debts upon Contracts, that percase ought rather after Charity to be paid than a Debt upon an Obligation? What may the Favour of the Executor do in these Cases?

Stud.

Stud. Nothing: for if they either perform Legacies, make Restitutions, or pay Debts upon Contracts, and keep not sufficient to pay Debts which they are compelled by the Law to pay, that shall be taken as a Devastaverunt bona Testatoris, that is to say, that they have wasted the Goods of their Testator; and therefore they shall be compelled to pay the Debts of their own Goods: And so it is, if they pay a Debt upon an Obligation, whereof the Day is yet to come, though it be the clearer Debt, and that be the more Charity to have it paid.

Doct. Yet in that Case, if he to whom the Debt is already owing forbear till after the Day of the other Obligation is past, then he may pay him without Danger.

Stud. That is true, if there be no Action taken upon it; and though there be, yet if that Action may be delayed by lawful Means, as thou hast spoken of before, till after the Day, and that an Action is taken upon it, then may the Executors confess the Action, and then after Judgment he may pay the Debt without Danger of the Law.

Doct. Is not that confessing of the Action so done of purpose a Covin in the Law?

Stud. No, verily; for Covin is where the Action is untrue, and not where the Executors bear a lawful Favour.

Doct. The Ordinary upon the Accompt in all the Case before rehearsed, will regard much what is best for the Testator.

Stud. But he may not drive them to Accompt against the Order of the Common Law.

CHAP. XI.

¶ The ninth Question of the Student.

A Man is indebted to another upon a simple Contract in 20 l. and he maketh his Will, and bequeatheth 20 l. to H. Hart, and dieth, and leaveth Goods to his Executors only to bury him with, and to perform the said Legacy, and after the said Executors deliver the Goods of their Testator in Performance of the said Bequest: Whether is he to whom the Bequest is made bound in Conscience to pay the said Debt upon the simple Contract, to the said H. Hart, or not?

Doct. Is he not bound thereto by the Law?

Stud. No, verily.

Doct. And what thinkest thou he is in Conscience?

Stud. I think that he is not bound thereto in Conscience, for he is neither Ordinary, Administrator, nor Executor. And I have not heard that any Man is bound to pay Debts of any Man that is deceased, but he be one of those three. For the Goods that the Testator left to the Executors were never charged with the Debt, but the Person of the Testator while he lived was only charged with the Debt, and not his Goods; and his Executors, that represent his Estate after his Death, having Goods thereto of the Testator's, be charged also with the Debts, and not the Goods. And therefore if an Executor give away or sell all the Goods of the Testator, or otherwise waste them,

them, he that hath the Goods is not charged with the Debts in Law nor Conscience, but the Executors shall be charged of their own Goods. And in like wise, if John at Noke owe to A. B. 20 l. and A. B. oweth to C. D. 20 l. and after A. B. dieth intestate, having none other Goods but the said 20 l. which the said John at Noke oweth him; yet the said C. D. shall have no Remedy against the said John at Noke, for he standeth not charged to him in Law nor Conscience. But the Ordinary in that Case must commit Administration of the Goods of the said A. B. and the said Administrator must levy the Money of the said John at Noke, and pay it to the said C. D. and the said John at Noke shall not pay it himself, because he is not charged therewith to him: And no more methinketh in this Case, that he to whom the Bequest is made, is neither charged to him that the Money was owing to, in the Law or Conscience.

Doct. Then shew me thy Mind, by what Law it was grounded, as thou thinkest, that Executors be bound to pay Debts before Legacies; whether it is by the Law of God, or by the Law of Reason, or by the Law of Man, as thou thinkest?

Stud. I think that it is both by the Law of Reason and by the Law of God. For Reason wills that they shall do first that is best for the Testator, and that is to pay Debts, that their Testator is bound to pay, before Legacies that he is not bound to. And also by the Law of God they are bound to pay the Debts first: For sith they are bound by the Law of

God

God to love their Neighbour, they are bound to do for him that shall be best for him, when they have taken the Charge thereto, as Executors do when they agree to take the Charge of the Will of their Testator upon them; and it is better for the Testator that his Debts be paid, (wherefore his Soul shall suffer Pain) than that his Legacies be performed, wherefore he shall suffer no Pain for the performing of them.

And that is to be understood, where the Legacy is made of his own Free-will, and not where it is made as a Satisfaction of any Duty. And after the Saying of St. Gregory, the very true Proof of Love is the Deed. But this Man is not in that Case, for he took never the Charge upon him to pay the Debts of the Testator, and therefore he is not bound to them in Law nor Conscience, as me seemeth: But rather the Executors should have been ware ere they had paid the Legacies, seeing there were Debts to pay.

Doct. The Executors might no otherwise have done in this Case, but to pay the Legacies: For them they should have been compelled by the Law to have paid, and so they could not have been to have paid the Debt upon a Contract, and therefore they did well in performing of that Legacy; but he to whom the Legacy was made ought not to have taken them, but ought in Conscience to have suffered them

The Law is otherwise resolved now, for that an Action lies against the Executor upon the Assumption implied in a simple Contract.

them to have gone to the Payment of the Debt? And sith he did not so, but took them where he had no Right to them, it seemeth that when he took them, he took with them the Charge in Conscience to pay the Debt: Forsith the Executors were compellable by the Law to perform that Bequest, and not to pay the Debt, therefore when they performed that Bequest, they were discharged thereby against him that the Debt was owing to, in the Law and Conscience; and then the Charge rested upon him that took the Goods, where he ought not in Conscience to have taken them: But if it had been a Debt upon an Obligation or such other Debt, whereupon Remedy hath been had against the Executors by the Law, I there suppose, though that the Executors had performed the Legacy, that yet he to whom the Legacy was made and performed, had not been charged in Conscience to the Payment of the Debt, for the Executors stood still charged thereto of their own Goods; and he to whom the Bequest was made was only bound in Conscience to repay that he received to the Executors, because he had no Right to have received it, for against the Executors he had no Right thereto.

Stud. Then it seemeth in this Case, that in like wise he to whom the Bequest was made should repay that he received to the Executors, and then they to pay it rather than he.

Doct. The Executors have no farther medling with it, as this Case is: For when they performed the Bequest, they were discharged against

against both the other in Law and Conscience: And also he to whom the Bequest was made stood not in this Case charged to the Executors; for against them he had good Title by the Law: And so this Charge standeth only against him that the Debt is owing to. And the same Law that is in this Case upon a Debt upon a Contract, is if the Testator had done a Trespass whereupon he ought to have made Restitution, that is to say, that he to whom the Bequest is made, is bound to make the Amends for the Trespass: For it should be no Discharge to him to pay it again to the Executors without they paid it over, and it were uncertain to him whether they should pay it or not. And therefore to be out of Peril, it is necessary that he pay it himself, and then he is surely discharged against all Men.

CHAP. XII.

¶ The tenth Question of the Student.

A Man seised of certain Land in his Demesne as of Fee, hath Issue two Sons, and dieth seised, after whose Death a Stranger abateth, and taketh the Profits, and after the eldest Son dieth without Issue, and his Brother bringeth an Assise of Mortdancestor as Son and Heir to his Father, not making mention of his Brother, and recovereth the Land with Damages from the Death of his Father,

Father, as he may well by the Law: whether in this Case is the younger Brother bound in Conscience to pay to the Executors of the eldest Brother the Value of the Profits of the said Land that belonged to the eldest Brother in his Life, or not?

Doct. What is thine Opinion therein?

Stud. That like as the said Profits belonged of Right to the eldest Brother in his Life, and that he had full Authority to have released as well the Right of the said Land as of the said Profits, which Release should have been a clear Bar to the younger Brother for ever; that the Right of the said Damages, which be in the Law but a Chattel, belong to his Executors, and not to the Heir: For no manner of Chattel, neither real nor personal, shall not after the Law of the Realm descend unto the Heir.

Doct. Thou saidest in the Case next before, that it is not of the Law of Reason, that a Man shall make Executors, and dispose of his Goods by his Will, and that the Executors shall have the Goods to dispose, but by the Law of Man; and if it be left to the Determination of the Law of Man, that in such Cases as the Law giveth such Chattels unto the Executors, they shall have good Right unto them, and in such Cases as the Law taketh such Chattels from them, they been rightfully taken from them: And therefore it is thought by many, that if a Man sue a Writ of Right of Ward of a Ward, that he hath by his own Fee, and dieth hanging the Writ, and his Heir sue a Resummons, according

cording to the Statute of Westminster 2, and recovereth; that in that Case the Heir shall enjoy the Wardship against the Executors, and yet it is but a Chattel. And they take the Reason to be, because of the said Statute. And so it might be ordained by Statute, that all Wards shall go to the Heirs, and not to the Executors. Right so in this Case, sith the Law is such, that the younger Brother shall in this Case have an Assise of Mortdauncestor as Heir to his Father, not making any mention of his elder Brother, and recover Damages as well in the Time of his Brother as in his own Time; it appeareth that the Law giveth the Right of these Damages to the Heir, and therefore no Recompence ought to be made to the Executors, as me seemeth. And it is not like to a Writ of Aiel, where, as I have learned in Latin, (sith our first Dialogue) the Demandant shall recover Damages only from the Death of his Father, if he overlive the Aiel: And the Cause is, for that the Demandant, though his Aiel overlived his Father, must of necessity make his Conveyance by his Father, and must make himself Son and Heir to his Father, and Cousin and Heir to his Aiel: And therefore in that Case if the Father overlived the Aiel, the Abator were bounden in Conscience to restore to the Executors of the Father the Profits run in his Time (for no Law taketh them from him) but otherwise it is in this Case, as me seemeth.

Stud. If the younger Brother in this Case had entred into the Land without taking any

Assise of Mortdancestor, as he might if he would, to whom were the Abators then bounden to make Restitution for those Profits, as thou thinkest?

Doct. To the Executors of the eldest Brother: For in that Case there is no Law that taketh them from them, and therefore the general Ground, which is that all Chattels shall go to the Executors, holdeth in that Case: But in this Case that Ground is broken and holdeth not, for the Reason that I have made before. For commonly there is no general Ground in the Law so sure, but it faileth in some particular Case.

CHAP. XIII.

¶ The eleventh Question of the Student.

Stud. A Man seised of Land in Fee taketh a Wife, and after alieneth the Land, and dieth, after whose Death his Wife asketh her Dower, and the Alienee refuseth to assign it unto her, but after she asketh her Dower again, and he assigneth it unto her: Whether is the Alienee in this Case bound in Conscience to give the Woman Damages for the Profits of the Land after her third Part from the Death of her Husband, or from the first Request of her Dower, or neither the one nor the other?

Doct. What is the Law in this Case?

Stud. By the Law the Woman shall recover no Damages; for at the Common Law the Demandant in a Writ of Dower should never have recovered Damages: But by the Statute of Merton

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it is ordained, that where the Husband dieth seised, that the Woman shall recover Damages, which is understood the Profits of the Land sith the Death of her Husband, and such Damages as she hath by the forbearing of it. But in this Case the Husband died not seised, wherefore she shall recover no Damages by the Law.

Doct. Yet the Law is, that immediately after the Death of her Husband the Wife ought of Right to have her Dower, if she ask it; though her Husband die not seised.

Stud. That is true.

Doct. And sith she ought to have her Dower from the Death of her Husband, it seemeth that she ought in Conscience to have also the Profits from the Death of her Husband, though she have no Remedy to come to them by the Law: For methinketh that this Case is like to a Case that thou puttest in our first Dialogue in Latin, the 17 Chapter, That if a Tenant for Term of Life be disseised and die, and the Disseisor dieth, and his Heir entreth and taketh the Profits, and after he in the Reversion recovereth the Lands against the Heir, as he ought to do by the Law, that in that Case he shall recover no Damages by the Law: And yet thou didst agree, that in that Case the Heir is bound in Conscience to pay the Damages to the Demandant; and so methinketh in this Case that the Feoffee ought in Conscience to pay the Damages from the Death of her Husband, seeing that immediately after his Death she ought to have her Dower.

Stud. Though she ought to be indowed immediately after the Death of her Husband, yet she can lay no Default in the Feoffee till she demand her Dower upon the Ground, and that the Tenant be not there to assign it, or if he be there, that he will not assign it: For he that hath the Possession of Land whereunto any Woman hath Title of Dower, hath good Authority as against her to take the Profits till she require her Dower; for every Woman that demandeth Dower affirmeth the Possession of the Tenant as against her: And therefore although she recover by Action, she leaveth the Reversion alway in him against whom she recovereth, though he be a Disseisor, and bringeth not the Reversion by her Recovery to him that hath Right, as other Tenants for Term of Life do. And for this Reason it is that the Tenant in a Writ of Dower, where the Husband died seised, if he appear the first Day, may say, to excuse himself of Damages, that he is, and all Times hath been ready to yield Dower if it had been demanded: And so he shall not be received to do in a Writ of Cosinage, neither in the Case that thou rememberest above; for in both Cases the Tenants be supposed by the Writ to be Wrong-doers, but it is not so in this Case; and so methinketh it is clear that the Feoffee in this Case shall never be bound by Law nor Conscience to yield Damages for the Time that passed before the Request, but for the Time after the Request is greater Doubt: Howbeit some think him there not bound to yield Damages, because his

Title

Title is good, as is said before, and that it is her Default that she brought not her Action.

Doct. As unto the Time before the Request I hold me content with thine Opinion, so that he assign the Dower when he is required: But when he refuseth to assign it, then I think him bound in Conscience to yield Damages for both Times, though she shall none recover by the Law. And first, as for the Time after the Refusal, it appeareth evidently, that when he denied to assign her Dower he did against Conscience; for he did not that he ought to have done by the Law, ne as he would should have been done to him; and so after the Request he holdeth her Dower from her wrongfully, and ought in Conscience to yield Damages therefore. And as to the Default that thou assignest in her, that she took not her Action, that forceth little; for Actions need not but where the Party will not do that he ought to do of Right; and for that he ought of Right to have done, and did it not, he can take no Advantage. And then as to the Damages before the Request, methinketh him also bounden to pay them; for when he was required to assign Dower, and refused, it appeareth that he never intended to yield Dower from the beginning, and so he is a Wrong-doer in his own Conscience. And moreover if the Husband die seised, the Law is such, that if the Tenant refuse to assign Dower when he is required, wherefore the Woman bringeth a Writ of Dower against him, that in that Case the Woman shall recover Damages as well for the Time before the Request as after; and yet he ought not in that Case, after thine Opinion, to have yielded any

Manner of Damages, if he had been ready to assign Dower when it was demanded, as some think here.

Stud. The Cause in the Case that thou hast put is, for that the Statute is general, that the Demandant shall recover Damages where the Husband died seised, and that Statute hath been alway construed, that where the Tenant may not say that he is and hath been ready alway to yield Dower, &c. that the Demandant shall recover Damages from the Death of her Husband. But in that Case there is no Law of the Realm that helpeth for the Demandant, neither Common Law nor Statute. And furthermore, though it might be proved by his Refusal, that he never intended from the Death of the Husband to assign her Dower; yet that proveth not but that he had good Right to take the Profits of her third Part for the Time, as well as he had of his own two Parts, till Request be made, as is aforesaid: And so methinketh that, notwithstanding the Denial, he is not bound to yield Damages in this Case, but for the Time of the Request, and not for the Time before.

Doct. For this Time I am content with thy Reason.

CHAP. XIV.

¶ The twelfth Question of the Student.

Stud. A Man seised of certain Lands, knowing that another hath good Right and Title to them, levieth a Fine with Proclamation, to the intent he would exting the Right of the other

other Man, and the other Man maketh no Claim within the five Years: Whether may he that levied the Fine hold the Land in Conscience, as he may do by the Law?

Doct. By this Question it seemeth that thou dost agree, that if he that levied the Fine had no Knowledge of the other Man's Right, that his Right should then be extincted by the Fine, in Conscience.

Stud. Yes, verily; for thou didst shew a reasonable Cause why it should be so, in our first Dialogue in Latin, the 24 Chap. as there appeareth. But if he that levied a Fine, and that would extinct the Right of another, knew that the other had more Right than he, then I doubt therein: For I take thine Opinion in the first Dialogue to be understood in Conscience, where he that would extinct former Rights by such a Fine by Proclamation, knoweth not of any former Title, but for his more Surety, if any such former Right be, taketh the Remedy that is ordained by the Law.

Doct. Whether dost thou mean in this Case that thou puttest now, that he that hath Right knoweth of the Fine, wilfully letting the five Years pass without Claim, or that he knoweth not any thing of the Fine?

Stud. I pray thee let me know thine Opinion in both Cases, and whether thou think that he that hath Right be barred in either of the said Cases by Conscience, as he is by the Law, or not?

Doct. I will with good-will hereafter shew thee my Mind therein: But at this Time I pray thee give a little sparing, and proceed now for this Time to some other Question.

CHAP. XV.

¶ The thirteenth Question of the Student.

Stud. A Man seised of certain Lands in Fee hath a Daughter, which is his Heir apparent, the Daughter taketh an Husband, and they have Issue; the Father dieth seised, and the Husband as soon as he heareth of his Death goeth toward the Land to take Possession, and before he can come there, his Wife dieth: Whether ought he to have the Land in Conscience for Term of his Life as Tenant by the Curtesy, because he hath done that in him was to have had Possession in his Wife's Life, so that he might have been Tenant by the Curtesy according to the Law; or that he shall neither have it by the Law nor Conscience?

Doct. Is it clearly holden in the Law that he shall not be Tenant by the Curtesy in this Case, because he had not Possession in Deed.

Stud. Yea verily, and yet upon a Possession in Law a Woman shall have her Dower; but no Man shall be Tenant by the Curtesy of Land without his Wife have Possession in Deed.

Doct. A Man shall be Tenant by the Curtesy of a Rent though his Wife die before the Day of Payment, and in like wise of an Advowson though she die before the Avoidance.

Stud.

Stud. That is truth; for the old Custom and Maxim of the Law is, that he shall be so: But of Land there is no Maxim that serveth him, but his Wife have Possession in Deed.

Doct. And what is the Reason that there is such a Maxim in the Law of the Rent and of the Advowson, rather than of Land, when the Husband doth as much as in him is, to have Possession, and cannot?

Stud. Some assign the Reason to be, because it is impossible to have Possession in Deed of the Rent or of Advowson, before the Day of Payment of the Rent, or before the Avoidance of the Advowson.

Doct. And so it is impossible that he should have Possession in Deed of Land, if his Wife die so soon that he may not by a Possibility come to the Land after his Father's Death, and in her Life, as the Case is.

Stud. The Law is such as I have shewed thee before: And I take the very Cause to be, for that there is a Maxim serveth for the Rent and the Advowson, and not for the Lands, as I have said before; and, as it is said in the 8 Chap. of our first Dialogue, it is not alway necessary to assign a Reason or Consideration why the Maxims of the Law of England were first ordained and admitted for Maxims; but it sufficeth that they have been always taken for Law, and that they be neither contrary to the Law of Reason nor to the Law of God, as this Maxim is not; and therefore if the Husband in this Case be not holpen by Conscience, he cannot be holpen by the Law.

Doct. And if the Law help him not, Conscience cannot help him in this Case: For Conscience must always be grounded upon some Law; and it cannot in this Case be grounded upon the Law of Reason nor upon the Law of God; for it is not directly by those Laws that a Man shall be Tenant by Curtesy, but by the Custom of the Realm; and therefore if the Custom help him not, he can nothing have in this Case by Conscience; for Conscience never resisteth the Law of Man, nor addeth nothing to it, but where the Law of Man is in it self directly against the Law of Reason or else the Law of God, and then properly it cannot be called a Law, but a Corruption; or where the general Grounds of the Law of Man work in any particular Case against the said Laws, as it may do, and yet the Law good, as it appeareth in divers Places in our first Dialogue in Latin; or else where there is no Law of Man provided for him that hath Right to a thing by the Law of Reason or by the Law of God: And then sometime there is Remedy given to execute that in Conscience, as by a Subpœna, but not in all Cases; for sometime it shall be referred to the Conscience of the Party, and upon this Ground (that is to say) that when there is no Title given by the Common Law, that there is no Title by Conscience. There be divers other Cases, whereof I shall put some for an Example: As if a Reversion be granted unto one, but there is no Attornment, or if a new Rent be granted by Word without Deed; there is no Remedy by Conscience, unless the said Grants were made upon Consideration of Money, or such other. And

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in like wise where he that is seised of Lands in Fee-simple maketh a Will thereof, that Will is void in Conscience, because the Ground serveth not for him whereby the Conscience should take Effect, that is to say, the Law. And if the Tenant make a Feoffment of the Land that he holdeth by Priority, and taketh Estate again, and dieth, (his Heir within Age) the Lord of whom the Land was first holden by Priority shall have no Remedy for the Body by Conscience; for the Law that first was with him, is now against him, and therefore Conscience is altered in like wise as the Law altereth. And divers and many Cases like be in the Law, that were too long to rehearse now. And thus methinketh, that if the Law be as thou sayest, the Husband in this Case hath neither Right by the Law nor Conscience.

CHAP. XVI.

¶ The fourteenth Question of the Student.

Stud. A Rent is granted to a Man in Fee to perceive of two Acres of Land, and after the Grantor enfeoffeth the Grantee of one of the said Acres: Whether is the Whole Rent extinct thereby in Conscience, as it is in the Law?

Doct. This Case is somewhat uncertain: For it appeareth not whether the Grantor enfeoffed him on Trust, or that he gave the Acre to him of his mere Motion to the Use of the said Feoffee; or else that the Feoffment was

made upon a Bargain: And if it were but only a Feoffment of Trust, then I think the whole Rent abideth in Conscience, though it be extincted in Law. And first, That it continueth in that Case in Conscience for the Part that the Grantee hath to the Use of the Grantor, it is evident, for he may take the Profits of the Land, and it is against Conscience that he should leese both. And in like wise it abideth in Conscience for the Acre that remaineth in the Hands of the Grantor, though it be extinct in the Law: For there was a Default in the Grantor that he would make a Feoffment to the Grantee, as well as there was in the Grantee to take it; and it is no Conscience that of his own Default he should take so great Avail, to be discharged of the whole Rent, seeing that the Feoffment was made to his own Use. And if the Feoffment were made upon a Bargain, and a Contract between them, then it is to see whether they remembred the Rent in their Bargain, or that they remembred it not; and if they remembred it in their Bargain and Contract, then Conscience must follow the Bargain: And thus, If they agreed that the Grantee should have the Rent after the Portion in the other Acre, then by Conscience he ought to have it, though it be extincted in the Law; and if they agreed that the whole Rent should be extinct, and made their Price according, then it is extinct in Law and Conscience; and if they clearly forgot it, and made no mention of it, or, for lack of Cunning, took the Law to be, that it should continue in the

the other Acre after the Portion, and made their Price according, pondering only the Value of the Acre that was sold, then methinketh it doth continue in Conscience after the Portion; and if the Feoffment were made to the Use of the Grantee, then it seemeth the whole Rent is extinct in Law and Conscience.

Stud. Then take this to be the Case, that is to say, That the Feoffment was made to the Use of the Grantee.

Doct. What is thine Opinion therein?

Stud. Then the Rent should abide in Conscience after the Portion of the Acre remaining in the Hands of the Grantor, notwithstanding it be extinct in the Law.

Doct. Then shew me thine Opinion in this that I shall ask thee: Of what Law is it, that Grants of Rent, and of such other Profits out of Lands may be made, and that they shall be good and effectual to the Grantees? Whether it be by the Law of Reason, or by the Law of God, or by the Custom and Law of the Realm?

Stud. I think it is by the Law of Reason: For by the same Reason that a Man may give away all his Lands, he may, as it seemeth, give away the Profits thereof, or grant a Rent out of the Land, if he will.

Doct. But then by what Law is it that a Man may give away his Lands? I trow by none other Law but by the Custom of the Realm; for by Statute all Alienations and Grants of Lands may be prohibited; and then that Reason proveth not that Grants of the

the Profits of Land or of a Rent should be good, because he may alien the Land, if Alienation of Land be by Custom, and not by the Law of Reason, as I suppose it is, whereof I have touched somewhat in our first Dialogue in Latin, the 19th Chapter. And also if Grants should have their Effect by the Law of Reason, then Reason would they should be good by the only Word of the Grantor, as well as by his Deed; and that is not so, for without Deed the Grant of Rent is void in Law: And so methinketh that Grants have their Effects only by the Law of the Realm.

Stud. Admit it be so, what meanest thou thereby?

Doct. I shall shew thee hereafter, as I shall shew thee the Cause why I think the Rent is extinct in Conscience as well as in Law. And first, as I take it, the Reason why it is extinct in the Law, is because the Rent by the first Grant was going out of both Acres, and was not going Part out of the one Acre, and Part out of the other, but the whole Rent was going out of both; and then when the Grantee of his own Folly will take Estate in the one Acre, whereby that Acre be discharged, then the other Acre also must be discharged, unless it should be apportioned; and the Law will not that any Apportionment should be in that Case, but rather insomuch as the Party hath by his own Act discharged the one Acre, the Law discharged also the other, rather than to suffer the other Acree to be charged, contrary to the Form of the Grant: For this Rent beginneth

neth all by the Act of the Party; and, as I have heard, it is called, A Rent against common Right. Wherefore it is not favoured in the Law, as a Rent-service is: And then methinketh, That forasmuch as it is not grounded by the Law of Reason, that Grants of Rent should be made out of Land, but by Custom and Law of the Realm, as I have said before, that so in likewise it remaineth to the Law and Custom of the Realm, to determin how long such Rents shall continue. And when the Law judgeth such Rent to be void, I suppose that so doth Conscience also, except the Judgment of the Law be against the Law of Reason or the Law of God, as it is not in this Case. For in this Case, he that taketh the Feoffment hath Profit by the Feoffment, and knoweth that he hath such a Rent out of the Land, and that this Purchase should extinct it, whereby it appeareth that he assented unto the Law, whereto he was not compelled, and that is his own Act and his own Default so to do, which shall extinct his whole Rent as well in Conscience as in Law. But if he have no Profit of the Land, or be ignorant that he hath such a Rent out of the Land, which is called Ignorance of the Deed, or if he be ignorant that the Law would extinct his whole Rent thereby, which is called Ignorance of the Law, then methinketh it remaineth in Conscience after the Portion.

Stud. Ignorance of the Law or of the Deed helpeth not but in few Cases in the Law of England.

Doct.

Doct. And therefore it must be reformed by Conscience, that is to say, by the Law of Reason. For when the general Maxims of the Law be in any particular Cases against the Law of Reason, as this Maxim seemeth to be, because it excepteth not them that be ignorant, though it be an Ignorance invincible; then doth it not agree with the Law of Reason.

Stud. Methinketh that Ignorance in this Case helpeth little. For when a Man buyeth any Land, or taketh it of the Gift of any other, he taketh it at his Peril, so that if the Title be not good, Ignorance cannot help, for the Buyer must beware what he buyeth: And so in this Case, if the taking of an Acre should extinct the whole Rent in Conscience, if he were not ignorant, so methinketh it should in like wise extinct it also, though he be ignorant of the Law, or of the Deed; for every Man must be compelled to take Notice of his own Title, and out of what Land his Rent is going, and so methinketh Ignorance is but little to be considered in this Case.

Doct. If a Man buy Land, or taketh it of the Gift of another, it is Reason that he take it with the Peril, though he be ignorant that another hath Right; for it were not standing with Reason that his Ignorance should extinct the Right of another: But in this Case there is no doubt of the Right of the Land, but all the doubt is how the Rent shall be ordered in Conscience, if he that hath the Rent take part of the Land: And therein is great Diversity between him that is ignorant in the Law, and him that knoweth the Law, and knoweth well also that he

he hath a Rent out of the Land, and other. For I put Case he asked Counsel of the Grantor himself therein, and he saying as he thought, told him, That the taking of the one Acre should not extinct the Rent but for the Portion, and so he thinking the Law to be, took the other Acre of his Gift: Is it not reasonable in that Case, that the Ignorance should save the Rent in Conscience?

Stud. Yes, for there the Grantor himself is Party to his Ignorance, and in manner the Cause thereof.

Doct. And methinketh all is one if any other had shewed him so, or if he asked no Counsel at all; for methinketh it sufficeth in this Case that he be ignorant of the Law: For why? it is more hard in this Case to prove the Rent should be extinct in Conscience, though he know it should be extinct in the Law, than to prove that it continueth in Conscience after the Portion, if he be ignorant; and thou thy self wert of the same Opinion, as it appeareth in the Beginning of this present Chapter. But if the Opinion were true, it would be hard to prove but that the said general Maxim were wholly against Reason, and then it were void. But I have sufficiently answered thereto, as me seemeth, and that it is extinct in the Law and also in Conscience, except Ignorance help it to be apportioned. And moreover, forasmuch as Apportionment is suffered in the Law, where Part of the Land descendeth to the Grantee, because no Default can be assigned in him; some think no Default can be assigned in him in Conscience, when he is ignorant of the Law

Law or of the Deed, though such Ignorance do not excuse in the Law of the Realm.

Stud. I am content with thy Opinion in this Behalf at this Time.

CHAP. XVII.

¶ The fifteenth Question of the Student.

A Man granteth a Rent-charge out of two Acres of Land, and after the Grantor enfeoffeth H. H. in one of the said two Acres to the Use of the said H. H. and of his Heirs, and after the said H. Hart, intending to extinct all the Rent, causeth the said Acre to be recovered against him to his own Use in a Writ of Entry in le Post, in the Name of the Grantee and of others, after the common course, the Grantee not knowing of it, and by Force of the said Recovery the other Demandants enter, and die living the Grantee, so that the Grantor is seised of all by the Survivor to the Use of the said H. H. whether is the said Rent extinct in Conscience in part, or in all, or no Part?

Doct. I am in doubt of the Law in this Case.

Stud. In what Point?

Doct. Whether the whole Rent be going out of the Acre that remaineth in the Hands of the Grantor, because the Grantee cometh to the Land by way of Recovery; or that it shall be extinct in Law but after the Portion, because the Grantee hath not the Acre to his own Use; or that the whole Rent shall be extinct in the Law?

Stud.

Stud. The Rent cannot be whole going out of the Acre that the Grantor hath: For this Recovery is upon a feigned Title; and the Grantor, because he is a Stranger to it, shall be well received to falsifie it. But if the Recovery had been upon a true Title, then it had been as thou sayest; if the Grantee recover the one Acre against the Grantor upon a true Title, the Grantor shall pay the whole Rent out of the Land that remaineth in his Hand. And as to the Use, it maketh no Matter to the Grantor as to the Law in whom the Use be; for the Possession without the Use extinguisheth the whole Rent as against him in the Law, as well as if the Possession and Use were both joined together in the Grantee.

Doct. Then methinketh that the said Henry Hart is bound in Conscience to pay the Grantee the Rent after the Portion of that Acre that was recovered; for it cannot stand with Conscience that he should lose his Rent, and have no Profits of the Land?

Stud. Then of whom shall he have the other Portion of his Rent?

Doct. Is the Law clear that the Acre that the Grantor hath shall be in this Case discharged in the Law?

Stud. I take the Law so.

Doct. And what in Conscience?

Stud. As against the Grantor, methinketh also it is extinct in Conscience, for the Reason that thou hast made in the 16th Chapter. For it is all one in Conscience in this Case as against the Grantor whether the Recovery were to the Use of the Grantee or not, especially seeing that the Grantor is not privy to the Recovery: For the

the Unity of Possession is the Cause of Extinguishment of the Rent against the Grantor, both in Law and Conscience, wheresoever the Use be. But if the Grantor hath been privy to the Cause of the Extinguishment, as he was in the Case that I put in the last Chapter, where the Grantor enfeoffed the Grantee of one of the Acres to the Use of the Grantee; there it is not extinct in Conscience in that Acre that remaineth in the Hands of the Grantor, though it be extinct in the Law, because he was privy to the Extinguishment himself: But he is not in this Case, and therefore it is extinct against him in Law and Conscience. And therefore methinketh that the Grantee shall in Conscience have the whole Rent of the said H. Hart, that causeth the said Recovery to be had in his Name, for in him was all the Default. But it is to be understood, that in all the Cases where it is said before in this Chapter, or in the Chapter next before, that the Rent is extinct in the Law, and not in Conscience, that in such Case all the Remedies that the Party might first have had for the Rent at the Common Law by Distress, Assise, or otherwise, are determined, and the Party that ought to have the Rent in Conscience shall be driven to sue for his Remedy by Subpœna.

Doct. I am content with thy Conceit in this Matter for this Time.

CHAP.

CHAP. XVIII.

¶ The sixteenth Question of the Student.

Stud. A Villein is granted to a Man for Term of Life, the Villein purchaseth Lands to him and to his Heirs, the Tenant for Term of Life entereth: In this Case by the Law he shall enjoy the Lands to him and to his Heirs; whether shall he do so in like wise in Conscience?

Doct. Methinketh it first good to see whether it may stand with Conscience, that one Man may claim another to be his Villein, and that he may take from him his Lands and Goods, and put his Body in Prison if he will: It seemeth he loveth not his Neighbour as himself that doth so to him.

Stud. That Law hath been so long used in this Realm and in other also, and hath been admitted so long in the Laws of this Realm, and in divers other Laws also, and hath been affirmed by Bishops, Abbots, Priors, and many other Men both Spiritual and Temporal, which have taken Advantage by the said Law, and have seised the Lands and Goods of their Villeins thereby, and call it their right Inheritance so to do; that I think it not good now to make doubt, ne to put it in Argument, whether it stand with Conscience or not? And therefore I pray thee, admitting the Law in that Behalf to stand in Conscience, shew me thine Opinion in the Question that I have made.

Doct.

Doct. Is the Law clear, that he that hath the Villein but only for Term of Life, shall have the Lands that that Villein purchaseth in Fee to him and to his Heirs?

Stud. Yes verily, I take it so.

Doct. I should have taken the Law otherwise: For if a Seigniory be granted to a Man for Term of Life, and the Tenant attourn, and after the Land escheat, and the Tenant for Term of Life entereth, he shall have there none other Estate in the Land than he had in the Seigniory: And methinketh that it should be like Law in this Case, and that the Lord ought to have in the Land but such Estate as he hath in the Villein.

Stud. The Cases be not alike: For in the Case of the Escheat the Tenant for Term of Life of the Seigniory hath the Lands in lieu of the Seigniory, that is to say, in the Place of the Seigniory, and the Seighiory is clearly extinct: But in this Case he hath not the Land in lieu of the Villein, for he shall have the Villein still as he had before, but he hath the Lands as a Profit come by means of the Villein, which he shall have in like Case as the Villein had them, that is to say, of all Goods and Chattels he shall have the whole Property, and of a Lease for Term of Years he shall have the whole Term, and for Term of Life he shall have the same Estate, the Lord shall have in the during the Life of the Villein, and of Land in Fee-simple, and of an Estate-tall that the Villein hath, the Lord shall have the whole Fee-simple, although he had the Villein but only for Term of Years, so that he enter or seise according to the Law before the Villen alien, or else he shall have nothing.

Doct. Verily, and if the Law be so, I think Conscience followeth the Law therein. For admitting that a Man may with Conscience have another Man to be his Villein, the Judgment of the Law in this Case (as to determine what Estate the Lord hath in the Land by his Entry) is neither against the Law of Reason nor against the Law of God, and therefore Conscience must follow the Law of the Realm. But I pray thee let me make a little Digression, to hear thine Opinion in another Case somewhat pertaining to the Question, and it is this: If an Executor have a Villein that his Testator had for Term of Years, and he purchaseth Lands in Fee, and the Executor entereth into the Land, what Estate hath he by his Entry?

Stud. A Fee-simple, but that shall be to the Behoof of the Testator, and shall be an Assets in his Hands.

Doct. Well then, I am content with thy Conceit at this Time in this Case, and I pray thee proceed to another Question.

Stud. Forasmuch as it appeareth in this Case and in some other before, that the Knowledge of the Law of England is right necessary for the good ordering of Conscience; I would hear thine Opinion, if a Man mistake the Law, what Danger it is in Conscience for the mistaking of it.

Doct. I pray thee put some Case in certain thereof that thou doubtest in, and I will with Good-will shew thee my Mind therein, or else it will be somewhat long or it cannot be plainly declared, and I would not be tedious in this Writing.

CHAP.

CHAP. XIX.

¶ The seventeenth Question of the Student.

Stud. A Man hath a Villein for Term of Life, the Villein purchaseth Lands in Fee, as in the Case of the last Chapter, and the Tenant for Term of Life entereth, and after the Villein dieth; he in the Reversion pretending that the Tenant for Term of Life hath nothing in the Land but for Term of Life of the Villein, asketh Counsel of one that sheweth him that he hath good Right to the Land, and that he may lawfully enter, and through that Counsel he in the Reversion entereth, by Reason of the which Entry great Suits and Expences follow in the Law, to the great Hurt of both Parties: What Danger is this to him that gave the Counsel?

Doct. Whether meanest thou that he that gave the Counsel gave it willingly against the Law, or that he was ignorant of the Law?

Stud. That he was ignorant of the Law: For if he knew the Law, and gave Counsel to the contrary, I think him bound to Restitution, both to him against whom he gave the Counsel, and also to his Client, (if he would not have sued but for his Counsel) of all that they be damnified by it.

Doct. Then will I yet farther ask thee this Question; Whether he of whom he asked Counsel gave himself to Learning, and to have know-

Knowledge of the Law after his Capacity? Or that he took upon him to give Counsel, and took no Study competent to have Learning? For if he did so, I think he be bounden in Conscience to Restitution of all the Costs and Damages that he sustained to whom he gave Counsel, if he would not have sued but through his Counsel, and also to the other Party. But if a Man that hath taken sufficient Study in the Law mistake the Law in some Point that is hard to come to the Knowledge of, he is not bounden to such Restitution, for he hath done that in him is: But if such a Man knowing the Law give Counsel against the Law, he is bound in Conscience to Restitution of Costs and Damages, (as thou hast said before) and also to make amends for the Untruth.

Stud. What if he ask Counsel of one that he knoweth is not learned, and he giveth him Counsel in this Case to enter, by Force whereof he entereth?

Doct. Then be they both bound in Conscience to Restitution; that is to say, the Party, if he be sufficient, and else the Counsellor, because he assented and gave Counsel to the Wrong.

Stud. But what is the Counsellor in that Case bounden to him that he gave Counsel to?

Doct. To nothing: For there was as much Default in him that asked the Counsel as in him that gave it; for he asked Counsel of him that he knew was ignorant: And in the other was Default for the Presumption, that he would take upon him to give Counsel in that he was ignorant in.

Stud. But what if he that gave the Counsel knew not but that he that asked it had Trust in him, that he could and would give him good Counsel, and that he asked Counsel for to order well his Conscience, howbeit that the Truth was that he could not so do?

Doct. Then is he that gave the Counsel bounden to offer to the other Amends, but yet the other may not take it in Conscience.

Stud. That were somewhat perillous; for haply he would take it, though he have no Right to it, except the World be well amended.

Doct. What thinkest thou in that Amendment?

Stud. I trust every Man will do now in this World as they would be done to, speak as they think, restore where they have done wrong, refuse Money if they have no Right to it, though it be offered them, so that they ought to do by Conscience, and though that they cannot be compelled to it by no Law; and that none will give Counsel but that they shall think to be according to Conscience, and if they do, to do what they can to reform it, and not to intermit themselves with such Matters as they be ignorant in, but in such Cases to send them that ask the Counsel to other that they shall think be more cunning than they are.

Doct. It were very well if it were as thou hast said, but, the more pity, it is not alway so; and especially there is great Default in Givers of Counsel: For some, for their own Lucre and Profit, give Counsel to comfort other to sue that they know have no Right, but I trust there be but few of them; and some for

Dread,

Dread, some for Favour, some for Malice, and some upon Considerations, and to have as much done for them another Time to hide the Truth. And some take upon them to give Counsel in that they be ignorant in, and yet when they know the Truth, will not withdraw that they have misdone, for they think it should be greatly to their Rebuke; and such Persons follow not this Counsel, that saith, That we have unadvisedly done, let us with good Advice revoke again.

Stud. And if a Man give Counsel in this Realm after as his Learning and Conscience giveth him, and regardeth the Laws of the Realm, giveth he good Counsel?

Doct. If the Law of the Realm be not in that Case against the Law of God, nor against the Law of Reason, he giveth good Counsel: For every Man is bound to follow the Law of the Country where he is, so it be not against the said Laws; and so may the Cases be, that he may bind himself to Restitution.

Stud. At this Time I will no farther trouble thee in this Question.

CHAP. XX.

The eighteenth Question of the Student.

If a Man of his meer Motion give Lands to H. Hart, and to his Heirs, by Indenture, upon a Condition, that he shall yearly at a certain Day, pay to John at Stile out of the same Land a certain Rent, and if he do

do not, that then it should be lawful to the said J. at Stile to enter, &c. if the Rent in this Case be not payed to J. at Stile, whether may the said John at Stile enter into the Lands by Conscience, though he may not enter by the Law?

Doct. May he not enter in this Case by the Law, sith the Words of the Indenture be that he shall enter?

Stud. No verily; for there is an ancient Maxim in the Law, that no Man shall take Advantage in a Condition, but he that is Party or Privy to the Condition; and this Man is not Party nor Privy, wherefore he shall have no Advantage of it.

Doct. Though he can have no Advantage of it as Party, yet because it appeareth evidently that the Intent of the Giver was, That if he were not payed of the Rent, that he should have the Land, it seemeth that in Conscience he ought to have it, though he cannot have it by the Law.

Stud. In many Cases the Intent of the Party is void to all Intents, if it be not grounded according to the Law: And therefore if a Man make a Lease to another for Term of Life, and after of his meer Motion he confirmeth his Estate for Term of Life to remain after his Death to another and to his Heirs; in this Case that Remainder is void in Law and Conscience: for by the Law there can no Remainder depend upon an Estate, but that the same Estate beginneth at the same Time that the Remainder doth; and in this Case the Estate began before, and the Confirmation enlarged not his Estate, nor gave him no new Estate. But if a Lease be made

made to a Man for Term of another Man's Life, and after the Lessor only of his meer Motion confirmeth the Land to the Lessee for the Term of his own Life, the Remainder over in Fee; that is a good Remainder in the Law and Conscience. And so methinketh the Intent of the Party shall not be regarded in this Case.

Doct. And in the first Case that thou hast put, methinketh though it pass not by way of Grant of that, yet shall it pass as by the way of Remainder of the Reversion; for every Deed shall be taken most strong against the Grantor, and the taking of a Deed in this Case is an Attornment in it self.

Stud. That cannot be, for he in the Remainder is not Party to the Deed, and therefore it cannot be taken by the way of Grant of the Reversion; for no Grant can be made but to him that is Party to the Deed, except it be by way of Remainder. And therefore if a Man make a Lease for Term of Life, and after the Lessor grant to a Stranger that the Tenant for Term of Life shall have the Land to him and to his Heirs, that Grant is void, if it be made only of his meer Motion without Recompence. And in like wise, if a Man make a Lease for Term of Life, and after grant the Reversion to one for Term of Life, the Remainder over in Fee, and the Tenant atturneth to him that hath the Estate for Term of Life only, intending that he only should have Advantage of the Grant; his Intent is void, and both shall take Advantage thereof, and the Attornment shall be taken good, according to the Grant. And so in this Case, though the Feoffor intended, that if the Rent were

not payed, that the Stranger should enter; yet because the Law giveth him no Entry in that Case, that Intent is void, and the same Stranger shall neither enter into the Land by Law nor Conscience.

Doct. What shall then be done with that Land, as thou thinkest, after the Condition broken?

Stud. I think the Feoffor in this Case may lawfully re-enter; for when the Feoffment was made upon Condition that the Feoffee would pay a Rent to a Stranger, in those Words is concluded in the Law, that if the Rent were not paid to the Stranger, that the Feoffor should re-enter: For those Words, upon Condition, imply so much in the Law, though it be not expressed. And then when the Feoffor went farther, and said that if the Rent were not paid, that the Stranger should enter, those Words were void in the Law; and so the Effect of the Deed stood upon the first Words, whereby the Feoffor may re-enter in Law and Conscience: But if the first Words had not been conditional, I would have holden it the greater Doubt.

Doct. I pray thee put the Case thereof in certain with such Words as be not conditional, that I may the better perceive what thou meanest therein.

CHAP.

CHAP. XXI.

¶ The nineteenth Question of the Student.

A Man maketh a Feoffment by Deed indented, and by the same Deed it is agreed, That the Feoffee shall pay to A. B. and to his Heirs a certain Rent yearly at certain Days, and that if he pay not the Rent, then it is agreed that A. B. or his Heirs shall enter into the Land; and after the Feoffee payeth not the Rent: Then the Question is, Who ought in Conscience to have this Land and Rent?

Doct. Ere we argue what Conscience will, let us know first what the Law will therein.

Stud. I think that by the Law neither the Feoffor ne yet the said A. B. shall ever enter into the Land in this Case for Non-payment of the Rent, for there is no Re-entry in this Case given to the Feoffor for not Payment of the Rent, as there is in the Case next before, and the Entry that is given to the said A. B. for not Payment thereof is void in the Law, because he is estrange to the Deed, as it appeareth also in the next Chapter before. And therefore methinketh that the greatest Doubt in this Case is, to see to what Use this Feoffment shall be taken.

Doct. There appeareth in this Case, as thou hast put it, no Consideration ne Recompence given to the Feoffor, whereupon any Use may be derived: And if the Case be so

indeed, and the Feoffor declared never his Mind therein, to what Use shall it then be taken?

Stud. I think it shall be taken to be to the Use of the Feoffee, as long as he payeth the Rent: For there is no Reason why the Feoffee should be busied with Payment of the Rent, having nothing for his Labour: Ne it may not conveniently be taken that the Intent of the Feoffor was so, except he expressed it; and then it must be taken that he intended to recompence the Feoffee for the Business that he should have in the Payment over, and by the Words following his Intent appeareth to be so, as methinketh; for if the Rent were not payed, he would that A. B. should enter, and so it seemeth he intended not to have any Use himself. And thus, me seemeth, this Case should vary from the Common Case of Uses; that is to say, if a Man seised of Land make a Feoffment thereof, and it appeareth not to what Use the Feoffment was made, ne it is not upon any Bargain or other Recompence, then it shall be taken to be to the Use of the Feoffor; except the contrary can be proved by some Bargain, or other like; or that his Intent at the Time of the Delivery of Seisin was expressed that it should be to the Use of the Feoffee or of some other; and then it shall go according to his Intent: But in this Case methinketh it shall be taken that his Intent was, That it should first be to the Use of the Feoffee, for the Cause before rehearsed, except the contrary can be proved; and so that Knowledge of the Intent of the Feoffor is the greatest Certainty

tainty for Knowledge of the Use in this Case, as me seemeth. But when the Feoffor goeth farther, and saith, That if the Rent be not paid, that then the said A. B. should enter into the Land; then it appeareth that his Intent was, that the Rent should cease, and that A. B. should enter into the Land: And though he may not by those Words enter into the Land after the Rules of the Law, and to have Free-hold, yet those Words seem to be sufficient to prove that the Intent of the Feoffor was, that he should have the Use of the Land: For sith he had the Rent to his own Use, and not to the Use of the Feoffor; so it seemeth he shall have the Use of the Land that is assigned to him for the Payment of the Rent.

Doct. But I am somewhat in doubt, whether he had the Rent to his own Use: For the Intent of the Feoffor might be, that he should pay the Rent for him to some other, or some other Use might be appointed thereof by the Feoffor.

Stud. If such an Intent can be proved, then the Intent must be observed: But we be in this Case to wit to what Use it shall be taken, if the Intent of the Feoffor cannot be proved; and then methinketh it cannot be otherwise taken, but it shall be to the Use of him to whom it should be paid. For though it be called a Rent, yet it is no Rent in Law, ne in the Law he shall never have Remedy for it, though it were assigned to him and to his Heirs without Condition, neither by Distress, by Assise, by Writ of Annuity, nor otherwise; but he shall be driven to sue in

in the Chancery for his Remedy: And then when he sueth in the Chancery, he must surmise that he ought to have it by Conscience, and that he can have no Remedy for it in the Law. And then, sith he hath no Remedy to come to it but by the way of Conscience, it seemeth it shall be taken, that when he hath recovered it, that he ought to have it in Conscience, and that to his own Use, without the contrary can be proved: And if the contrary can be proved, and that the intent of the Feoffor was, that he should dispose it for him as he should appoint, then hath he the Rent in Use to another Use, and so one Use should be depending upon another Use, which is seldom seen, and shall not be intended till it be proved: And so, sith no Matter is here expressed, methinketh the Rent shall be taken to be to the Use of him that it is paid to, and the Land in like wise that is appointed to him for not Payment of the said Rent shall be also to his Use: Now thinkest thou will Conscience serve therein?

Doct. I think that as thou takest the Law now, that Conscience (in this Case) and the Law be all one: For the Law searcheth the same Thing in this Case, to know the Case that Conscience doth, that is to say, the Intent of the Feoffor. And therefore I would move thee farther in one Thing.

Stud. What is that?

Doct. That sith the Intent of the Feoffor shall be so much regarded in this Case, why it ought not also to be as much regarded in the Case that

that is in the last Chapter next before this where the Words be conditional, and give the Feoffor a Title to re-enter. For methinketh, that though the Feoffor may in that Case re-enter for the Condition broken, that yet after this Entry he shall be seised of the Land after his Entry to the Use of him to whom the Land was assigned by the said Indenture for lack of Payment of the Rent, because the Intent of the Feoffor shall be taken to be so in that Case as well as in this. And I pray thee let me know thy Mind what Diversity thou puttest between them?

Stud. Thou drivest me now to a narrow Diversity, but yet I will answer thee therein as well as I can.

Doct. But first, ere thou shew me that Diversity, I pray thee shew me how Uses began, and why so much Land hath been put in Use in this Realm as hath been.

Stud. I will with good-will say as methinketh therein.

CHAP. XXII.

¶ How Uses of Land first began, and by what Law; and the Cause why so much Land is put in Use.

Uses were reserved by a secondary Conclusion of the Law of Reason in this Manner: When the general Custom of Property, whereby every Man knew his own Goods from his Neighbour's, was brought in among the

 People,

People, it followed of Reason, that such Lands and Goods as a Man had, ought not to be taken from him but by his Assent, or by Order of a Law: And then sith it be so, that every Man that hath Lands hath hereby two Things in him, that is to say, the Possession of the Land, which after the Law of England is called the Frank-tenement or the Free-hold, and the other is Authority to take thereby the Profits of the Land; wherefore it followeth, that he that hath Land, and intendeth to give only the Possession and Freehold thereof to another, and keep the Profits to himself, ought in Reason and Conscience to have the Profits, seeing there is no Law made to prohibit, but that in Conscience such Reservation may be made. And so when a Man maketh a Feoffment to another, and intendeth that he himself shall take the Profits; then the Feoffee is said seised to his Use that so enfeoffed him, that is to say, to the Use that he shall have the Possession and Freehold thereof, as in the Law, to the intent that the Feoffor shall take the Profits. And under this Manner, as I suppose, Uses of Land first began.

Doct. It seemeth that the reserving of such Use is prohibited by the Law: For if a Man make a Feoffment, and reserve the Profits, or any Part of the Profit, as the Grass, Wood, or such other; that Reservation is void in the Law: And methinketh it is all one to say, that the Law judgeth such a Thing, if it be done, to be void, and that the Law prohibiteth that the Thing shall not be done.

Stud.

Stud. Truth it is, that such Reservation is void in the Law, as thou sayest: And that is by Reason of a Maxim in the Law, that willeth that such Reservation of Part of the same Thing shall be judged void in the Law. But yet the Law doth not prohibit that no such Reservation shall be made, but if it be made it judgeth of what Effect it shall be; that is to say, that it shall be void: And so he that maketh such Reservation offendeth no Law thereby, ne breaketh no Law thereby, and therefore the Reservation in Conscience is good. But if it were prohibit by Statute that no Man should make such a Reservation, ne that no Feoffment of Trust should be made, but that all the Feoffments should be to the Use of him to whom Possession of the Land is given; then the Reservation of such Uses against the Statute should be void, because it were against the Law: And yet such a Statute should not be a Statute against Reason, because such Uses were first grounded and reserved by the Law of Reason; but it should prevent the Law of Reason, and should put away the Consideration whereupon the Law of Reason was grounded before the Statute made. And then to the other Question, that is to say, Why so much Land hath been put in Use? it will be somewhat long, and peradventure to some tedious, to shew all the Causes particularly: But the very Cause why the Use remained to the Feoffor, notwithstanding his own Feoffment or Fine, and sometime notwithstanding a Recovery against him, is all upon one Consideration after the Cause and Intent of the Gift, Fine or Recovery, as is aforesaid.

Doct.

Doct. Though Reason may serve that upon a Feoffment a Use may be reserved to the Feoffor by the Intent of the Feoffor against the Form of his Gift, as thou hast said before; yet I marvel much how an Use may be reserved against a Fine, that is one of the highest Records that is in the Law, and is taken in the Law of so high Effect, that it should make an end of all Strifes; or against a Recovery, that is ordained in the Law for them that be wronged to recover their Right by. And methinketh, that great Inconvenience and Hurt may follow, when such Records may so lightly be avoided by a secret Intent or Use of the Parties, and by a nude and bare Averment and Matter in Deed, and specially sith such a Matter in Deed may be alledged that is not true, whereby may rise great Strife between the Parties and great Confusion and Uncertainty in the Law. But, neverthelefs, sith our Intent is not at this Time to treat of that Matter, I pray thee touch shortly some of the Causes, why there hath been so many Persons put in Estate of Lands to the Use of others as there have been; for, as I hear say, few Men be sole seised of their own Land.

Stud. There hath been many Causes thereof, of the which some be put away by divers Statutes, and some remain yet. Wherefore thou shalt understand, that some have put their Land in Feoffment secretly, to the Intent that they that have Right to the Land should not know against whom to bring their Action, and that is somewhat remedied by divers Statutes that give Actions against Pernors and Takers of the

the Profits. And sometime such Feoffments of Trust have been made to have Maintenance and bearing of their Feoffees, which peradventure were great Lords or Rulers in the Country: And therefore to put away such Maintenance, treble Damages be given by Statute against them that make such Feoffments for Maintenance. And sometime they were made to the Use of Mortmain, which might then be made without Forfeiture; though it were prohibited that the Free-hold might not be given in Mortmain: But that is put away by the Statute of R. 2. And sometime they were made to defraud the Lords of Wards, Reliefs, Heriots, and of the Lands of their Villeins: But those Points be put away by divers Statutes made in the Time of King H. the 7th. Sometime they were made to avoid Executions upon a Statute-Staple, Statute-Merchant, and Recognisance: And Remedy is provided for that, that a Man shall have Execution of all such Lands as any Person is seised of to the Use of him that is so bound at the Time of Execution sued, in the 19th Year of H. 7. And yet remain Feoffments, Fines, and Recoveries in Use for many other Causes, in manner as many as there did before the said Estatute. And one Cause why they be yet thus used is, to put away Tenancy by the Curtesie and Titles of Dower. Another Cause is, for that the Lands in Use shall not be put in Execution upon a Statute-Staple, Statute-Merchant, nor Recognisance, but such as be in the Hands of the Recognisor at the Time of the Execution sued. And sometime

time Lands be put in Use, that they should not be put in Execution upon a Writ of Extendi facias ad valentiam. And sometime such Uses be made that he to whose Use, &c. may declare his Will thereon: And sometime for Surety of divers Covenants in Indentures of Marriage and other Bargains. And these two last Articles be the chief and principal Cause why so much Land is put in Use. Also Lands in Use be not Assets neither in a Formedon, nor in an Action of Debt against the Heir: Ne they shall not be put in Execution by an Elegit sued upon a Recovery, as some Men say. And these be the very chief Causes, as I now remember, why so much Land standeth in Use as there doth: And all the said Uses be reserved by the Intent of the Parties understood or agreed between them, and that many Times directly against the Words of the Feoffment, Fine, or Recovery: And that is done by the Law of Reason, as is aforesaid.

Doct. May not a Use be assigned to a Stranger as well as to be reserved to the Feoffor, if the Feoffor so appointed it upon his Feoffment?

Stud. Yes, as well, and in like wise to the Feoffee, and that upon a free Gift, without any Bargain or Recompence, if the Feoffor so will.

Doct. What if no Feoffment be made, but that a Man grant to his Feoffee, that from henceforth he shall stand seised to his own Use? Is not that Use changed, though there be no Recompence?

Stud. I think yes, for there was an Use in esse before the Gift, which he might as lawfully give away, as he might the Land if he had it in Possession.

Doct. And what if a Man being seised of Land in Fee, grant to another of his meer Motion, without Bargain or Recompence, that he from thenceforth shall be seised to the Use of the other; Is not that Grant good?

Stud. I suppose that it is not good; for, as I take the Law, a Man cannot commence an Use but by Livery of Seisin, or upon a Bargain, as some other Recompence.

Doct. I hold me contented with that thou hast said in this Chapter for this Time; and I pray thee shew me what Diversity thou puttest between those two Cases that thou hast before rehearsed in the 20th Chapter and in the 21st Chapter of this present Book.

Stud. I will with Good-will.

CHAP. XXIII.

¶ The Diversity between two Cases hereafter following, whereof one is put in the 20th Chapter, and the other in the 21st Chapter of this present Book.

THE first Case of the said two Cases is this. A Man maketh a Feoffment by a Deed indented, upon a Condition that the Feoffee shall pay certain Rent yearly to a Stranger, &c. and if he pay it not, that it shall be lawful to the Stranger to enter into the Land. In this Case, I said before in the 20th Chapter, that the Stranger might not enter,

enter, because that he was not privy unto the Condition. But I said, that in that Case the Feoffor might lawfully re-enter by the first Words of the Indenture, because they imply a Condition in the Law, and that the other Words, that is to say, That the Stranger should enter, be void in Law and Conscience. And therefore I said farther, That when the Feoffee had re-entered, that he was seised of the Land to his own Use, and not to the Use of the Stranger, though his intent at the making of the Feoffment were, That the Stranger, after his Entry, should have had the Land to his own Use, if he might have entered by the Law. And the Cause why I think that the Feoffor was seised in that Case to his own Use I shall shew thee afterward. The second Case is this; a Man maketh a Feoffment in Fee, and it is agreed upon the Feoffment, That the Feoffor shall pay a yearly Rent to a Stranger, and if he pay it not, that then the Stranger shall enter into the Land. In this Case I said, as it appeareth in the said xxi Chapter, that if the Feoffor paid not the Rent, that the Stranger should have the Use of the Land, though he may not by the Rules of the Law enter into the Land. And the Diversity between the Cases methinketh to be this. In the first Case it appeareth, as I have said before in the said xx Chapter, that the Feoffor might lawfully re-enter by the Law for not Payment of Rent; and then when he entered according, he by that Entry avoided the first Livery of Seisin, insomuch that after the Re-entry he was seised of the Land of like Estate

Estate as he was before the Feoffment; and so remaineth nothing whereupon the Stranger might ground his Use, but only the bare Grant or Intent of the Feoffor, when he gave the Land to the Feoffee upon Condition that he should pay the Rent to the Stranger, and if not, that it should be lawful to the Stranger to enter: For the Feoffment is avoided by the Re-entry of the Feoffor, as I have said before: And as I said in the last Chapter, as I suppose, a nude or bare Grant of him that is seised of Land is not sufficient to begin an Use upon.

Doct. A bare Grant may change an Use, as thou thy self agreed in the last Chapter: Why then may not an Use as well begin upon a bare Grant?

Stud. When a Use is in esse, he that hath the Use may of his meer Motion give it away, if he will, without Recompence, as he might the Land, if he had it in Possession: But I take it for a Ground, that he cannot so begin an Use without Livery of Seisin, or upon a Recompence or Bargain. And that there is such a Ground in the Law, that it may not so begin, it appeareth thus. It hath been alway holden for Law, That if a Man make a Deed of Feoffment to another, and deliver the Deed to him as his Deed, that in this Case he to whom the Deed is delivered hath no Title ne medling with the Land afore Livery of Seisin be made to him, but only that he may enter and occupy the Land at the Will of the Feoffor. And there is no Book saith that the Feoffee in that Case is seised thereof, before Livery to the Use

of

of the Feoffee. And in like wise, if a Man make a Deed of Feoffment of two Acres of Land that lie in two Shires, intending to give them to the Feoffee, and maketh Livery of Seisin in the one Shire, and not in the other; in this Case it is commonly holden in Books, That the Deed is void to the Acre, where no Livery is made, except it lie within that View, save only that he may enter and occupy at Will, as is aforesaid: And there is no Book that saith that the Feoffee should have the Use of the other Acre; for if an Use passed thereby, then were not the Deed void unto all Intents; and yet it appeareth by the Words of the Deed, that the Feoffor gave the Lands to the Feoffee, but for lack of Livery of Seisin the Gift was void: And so methinketh it is here, without Livery of Seisin be made according. But in the second Case of the said two Cases, the Feoffor may not re-enter for Non-payment of the Rent, and so the first Livery of Seisin continueth and standeth in effect; and thereupon the first Use may well begin and take Effect in the Stranger of the Land, when the Rent is not paid unto him according to the first Agreement. And so methinketh that in the first Case the Use is determined, because the Livery of Seisin whereupon it commenced is determined; and that in the second Case the Use of the Land taketh effect in the Stranger for not Payment of the Rent by the Grant made at the first Livery, which yet continueth in his Effect: And this methinketh is the Diversity between the Cases.

Doct.

Doct. Yet, notwithstanding the Reason that thou hast made, methinketh that if a Man seised of Lands make a Gift thereof by a nude Promise, without any Livery of Seisin or Recompence to him made, and grant that he shall be seised to his Use, that though the Promise be void in Law, that yet nevertheless it must hold and stand good in Conscience and by the Law of Reason. For one Rule of the Law of Reason is, That we may do nothing against the Truth: And sith the Truth is, That the Owner of the Ground hath granted that he shall be seised to the Use of the other, that Grant must needs stand in Effect, or else there is no Truth in the Grantor.

Stud. It is not against the Truth of the Grantor in this Case, though by the Grant he be not seised to the Use of the other; but it proveth that he hath granted that the Law will not warrant him to grant, wherefore his Grant is void. But if the Grantor had gone farther and said, That he would also suffer the other to take the Profits of the Lands without Lett or other Interruption, or that he would make him Estate in the Land when he should be required; then I think in those Cases he were bound in Conscience, by that Rule of the Law of Reason that thou hast remembred, to perform them, if he intend to be bounden by his Promise; for else he should go against his own Truth, and against his own Promise. But yet it shall make no Use in that Case, nor he to whom the Promise is made shall have no Action in the Law upon that Promise, though it be not performed; for it is called in the Law a Nude or naked Promise. And thus, methinketh, that in the

the first Case of the said two Cases, the Grant is now avoided in the Law by the Re-entry of the Feoffor, and that the Feoffor is not bounden by his Grant neither in Law nor Conscience: But in that second Case he is bound, so that the Use passeth from him, as I have said before.

Doct. I hold me content with thy Conceit for this Time, but I pray thee shew me somewhat more at large what is taken for a nude Contract, or naked Promise, in the Laws of England, and where an Action may lie thereupon, and where not.

Stud. I will with Good-will say as methinketh therein.

CHAP. XXIV.

¶ What is a nude Contract, or naked Promise, after the Laws of *England*, and whether any Action may lie thereon.

FIrst, it is to be understood, that Contracts be grounded upon a Custom of the Realm, and by the Law that is called Jus gentium, and not directly by the Law of Reason: For when all things were in common, it needed not to have Contracts, but after Property was brought in, they were right expedient to all People, so that a Man might have of his Neighbour that he had not of his own; and that could not be lawfully but by his Gift, by way of Lending, Concord, or by some Lease, Bargain, or Sale; and such Bargains and Sales be called Contracts, and be made by Assent of the Parties upon Agreement between them.

them, of Goods or Lands, for Money, or for other Recompence, but only of Money usual, for Money usual is no Contract. Also a Concord is properly upon an Agreement between the Parties with divers Articles therein, some rising on the one Part, and some on the other. As if John at Stile letteth a Chamber to Henry Hart, and it is farther agreed between them, That the said Henry Hart should go to board with the said John at Stile, and the said Henry Hart to pay for the Chamber and Boarding a certain Sum, &c. this is properly called a Concord; but it is also a Contract, and a good Action lieth upon it. Howbeit it is not much argued in the Laws of England what Diversity is between a Contract, a Concord, a Promise, a Gift, a Loan, or a Pledge, a Bargain, a Covenant, or such other. For the Intent of the Law is to have the Effect of the Matter argued, and not the Terms. And a nude Contract is, when a Man maketh a Bargain, or a Sale of his Goods or Lands, without any Recompence appointed for it: As if I say to another, I sell thee all my Land, or else my Goods, and nothing is assigned that the other shall give or pay for it; this is a nude Contract, and, as I take it, it is void in the Law and Conscience. And a nude or naked Promise is, where a Man promiseth another to give him certain Money such a Day, or to build an House, or to do him such certain Service, and nothing is assigned for the Money, for the Building, nor for the Service; these be called naked Promises, because there is nothing assigned why they should be made; and I think no Action lieth in

in those Cases, though they be not performed. Also if I promise to another to keep him such certain Goods safely to such a Time, and after I refuse to take them, there lieth no Action against me for it. But if I take them, and after they be lost or impaired through my negligent keeping, there an Action lieth.

Doct. But what Opinion hold they that be learned in the Law of England in such Promises that be called naked or nude Promises? Whether do they hold that they that make the Promise be bounden in Conscience to perform their Promise, though they cannot be compelled thereto by the Law, or not.

Stud. The Books of the Law of England entreat little thereof, for it is left to the Determination of Doctors: And therefore I pray thee shew me somewhat now of thy Mind therein, and then I shall shew thee somewhat therein of the Minds of divers that be learned in the Law of the Realm.

Doct. To declare the Matter plainly after the Saying of Doctors, it would ask a long Time, and therefore I will touch it briefly, to give thee Occasion to desire to hear more therein hereafter. First thou shalt understand, That there is a Promise that is called an Advow, and that is a Promise made to God; and he that doth make such a Vow upon a deliberate Mind, intending to perform it, is bound in Conscience to do it, though it be only made in the Heart, without pronouncing of Words. And of other Promises made to a Man upon a certain Consideration, if the Promise be not against the Law, as if A. promise to give B. 20l. because

cause he hath made him such a House, or hath lent him such a thing, or other such like, I think him bound to keep his Promise. But if his Promise be so naked, that there is no manner of Consideration why it should be made, then I think him not bound to perform it: For it is to suppose that there were some Error in the making of the Promise. But if such a Promise be made to an University, to a City, to the Church, to the Clergy, or to poor Men of such a Place, and to the Honour of God, or such other Cause like, as for Maintenance of Learning, of the Commonwealth, of the Service of God, or in Relief of Poverty, or such other; then I think that is bounden in Conscience to perform it, though there be no Consideration of worldly Profit that the Grantor hath had or intendeth to have for it. And in all such Promises it must be understood, that he that made the Promise intended to be bound by his Promise; for else commonly, after all Doctors, he is not bound unless he were bound to it before his Promise: As if a Man promise to give his Father a Gown that hath need of it, to keep him from cold, and yet thinketh not to give it him, nevertheless he is bound to give it, for he was bound thereto before. And, after some Doctors, a Man may be excused of such a Promise in Conscience by Casualty that cometh after the Promise, if it be so, that if he had known of the Casualty at the making of the Promise he would not have made it. And also such Promises if they shall bind, they must be honest, lawful, and possible, and else they are not to be holden in Conscience, though there

there be a Cause, &c. And if the Promise be good and with a Cause, though no worldly Profit shall grow thereby to him that maketh the Promise, but only a spiritual Profit, as in the Case before rehearsed of a Promise made to an University, to a City, to the Church, or such other, and with a Cause as to the Honour of God, there it is most commonly holden that an Action upon those Promises lieth in the Law Canon.

Doct. Whether dost thou mean in such Promises made to an University, to a City, or to such other, as thou hast rehearsed before, and with a Cause as to the Honour of God, or such other, that the Party shall be bound by his Promise, if he intended not to be bound thereby, yea or nay?

Doct. I think nay, no more than upon Promises made unto common Persons.

Doct. And then methinketh clearly, that no Action can lie against him upon such Promises, for it is secret in his own Conscience whether he intended for to be bound or nay. And of the Intent inward in the Heart, Man's Law cannot judge, and that is one of the Causes why the Law of God is necessary, (that is to say) to judge inward things: And if an Action should lie in that Case in the Law-Canon, then should the Law-Canon judge upon the inward Intent of the Heart, which cannot be, as me seemeth. And therefore, after divers that be learned in the Laws of the Realm, all Promises shall be taken in this Manner: That is to say, If he to whom the Promise is made have a charge by Reason of the Promise, which he hath also

also performed, then in that Case he shall have an Action for that Thing that was promised, though he that made the Promise have no worldly Profit by it. And if a Man say to another, Heal such a poor Man of his Disease, or, make an Highway, and I will give thee thus much; and if he do it, I think an Action lieth at the Common Law. And moreover, though the Thing that he shall do be all Spiritual, yet if he perform it, I think an Action lieth at the Common Law. As if a Man say to another, Fast for me all the next Lent, and I will give thee twenty Pounds, and he performeth it; I think an Action lieth at the Common Law. And likewise if a Man say to another, Marry my Daughter, and I will give thee twenty Pounds; upon this Promise an Action lieth, if he marry his Daughter. And in this Case he cannot discharge the Promise though he thought not to be bound thereby; for it is a good Contract, and he may have quid pro quo, that is to say, the Preferment of his Daughter for his Money. But in those Promises made to an University, or such other as thou hast remembred before, with such Causes as thou hast shewed, that is to say, to the Honour of God, or to the Increase of Learning, or such other like, where the Party to whom the Promise was made is bound to no new Charge by Reason of the Promise made to him, but as he was bound to before; there they think that no Action lieth against him, though he perform not his Promise, for it is no Contract, and so his own Conscience must be his Judge whether he intended to be bound by

his Promise or not. And if he intended it not, then he offended for his Dissimulation only; but if he intended to be bound, then if he perform it not, Untruth is in him, and he proveth himself to be a Lier, which is prohibited as well by the Law of God as by the Law of Reason. And furthermore, many that be learned in the Law of England hold, That a Man is as much bounden in Conscience by a Promise made to a common Person, if he intended to be bound by his Promise, as he is in the other Cases that thou hast remembred of a Promise made to the Church, or the Clergy, or such other: For they say that as much Untruth is in the breaking of the one as of the other; and they say that the Untruth is more to be pondered then the Person to whom the Promises be made.

Doct. But what hold they if a Promise be made for a Thing past, as I promise thee xl li. for that thou hast builded me such a House, lieth an Action there?

Stud. They suppose nay, but he shall be bound in Conscience to perform it after his Intent, as is before said.

Doct. And if a Man promise to give another xl l. in Recompence for such a Trespass that he hath done him, lieth an Action there?

Stud. I suppose nay, and the Cause is, for that such Promises be no perfect Contracts. For a Contract is properly where a Man for his Money shall have by Assent of the other Party certain Goods or some other Profit at the Time of the Contract or after: But if the Thing be promised for a Cause that is past by way of Recompence, then it is rather an Accord than a Contract; but then

the

the Law is, that upon such Accord the Thing that is promised in Recompence must be paid or delivered in Hand, for upon an Accord there lieth no Action.

Doct. But in the Case of Trespass, Whether hold they that he be bound by his Promise, though he intended not to be bound thereby?

Stud. They think nay, no more than in the other Cases that be put before.

Doct. In the other Cases he was not bound to that he promised, but only by his Promise; but in this Case of Trespass he was bound in Conscience, before the Promise, to make Recompence for the Trespass: And therefore it seemeth that he is bound in Conscience to keep his Promise, though he intended not to be bound thereby.

Stud. Though he were bound before the Promise to make Recompence for his Trespass, yet he was not bound to no Sum in certain but by his Promise: And because that the Sum may be too much or too little, and not egal to the Trespass, and that the Party to whom the Trespass was done, notwithstanding the Promise, is at liberty to take his Action of Trespass if he will; therefore they hold that he may be his own Judge in Conscience whether he intended to be bound by his Promise or not, as he may in other Cases; but if it were of a Debt, then they hold that he is bound to perform his Promise, in Conscience.

Doct. What if in the Case of Trespass he affirmeth his Promise with an Oath?

Stud. Then they hold that he is bound to perform it for saving of his Oath, though he intended not to be bound: But if he intended to be bound by his Promise, then they say that an Oath needeth not but to enforce the Promise; for they say, he breaketh the Law of Reason, which is, that we may do nothing against the Truth, as well when he breaketh his Promise that he thought in his own Heart to be bound by, as he doth when he breaketh his Oath, though the Offence be not so great, by Reason of the Perjury. Moreover to that thou sayest, that upon such Promises as thou hast rehearsed before, shall lie an Action after the Law Canon; verily as to that in this Realm there can no Action lie thereon in the Spiritual Court, if the Promise be of a temporal Thing; for a Prohibition or a Præmunire facias should lie in that Case.

Doct. That is marvel, sith there can no Action lie thereon in the King's Court, as thou sayest thy self.

Stud. That maketh no Matter: For though there lie no Action in the King's Court against Executors upon a simple Contract; yet if they be sued in that Case for the Debt in the Spiritual Court, a Prohibition lieth. And in like wise, if a Man wage his Law untruly in an Action of Debt upon a Contract in the King's Court, yet he shall not be sued for the Perjury in the Spiritual Court, and yet no Remedy lieth for the Perjury in the King's Courts: For the Prohibition lieth not only where a Man is sued in the Spiritual Court of such Things as the Party may have his Remedy in the King's Court, but also where the Spiritual Court holdeth Plea, in such Case where

where they by the King's Prerogative, and by the ancient Custom of the Realm, ought none to hold.

Doct. I will take Advisement upon that thou hast said in this Matter till another Time, and I pray thee now proceed to another Question.

CHAP. XXV.

The twentieth Question of the Student.

Stud. A Man hath two Sons, one born before Espousals, and the other after Espousals, and the Father by his Will bequeatheth to his Son and Heir all his Goods: Which of these two Sons shall have the Goods in Conscience?

Doct. As I said in our first Dialogue in Latin, the last Chapter, the Doubt of this Case dependeth not in the knowing what Conscience will in this Case, but rather the knowing which of the Sons shall be judged Heir, (that is to say) whether he shall be taken for Heir, that is Heir by the Spiritual Law, or he that is Heir by the Law of the Realm, or else that it shall be judged for him that the Father took for Heir.

Stud. As to that Point, admit the Father's Mind not to be known, or else that his Mind was that he should be taken for Heir that should be judged for Heir by the Law, that in this Case it ought to be judged by; and then, I pray thee, shew me thy Mind therein: For though the Question be not directly depending upon

upon the Point to see what Conscience will in this Case, yet it is right expedient for the well ordering of Conscience, that it be known after what Law it shall be judged: For if it ought to be judged after the Temporal Law who should be Heir, then it were against Conscience, if the Judges in the Spiritual Law should judge him for Heir that is the Heir by the Spiritual Law, and I think they should be bound to Restitution thereby. And therefore, I pray thee, shew me thine Opinion, after what Law it shall be judged.

Doct. Methinketh that in this Case it shall be judged after the Law of the Church; for it appeareth that the Bequest is of Goods: And therefore if any Suit shall be taken upon the Execution of the Will for the Bequest, it must be taken in the Spiritual Court; and when it is depending in the Spiritual Court, methinketh it must be judged after the Spiritual Law; for of the Temporal Law they have no knowledge, nor they are not bound to know it, as methinketh; and more stronger not to judge after it. But if the Bequest had been of a Chattel real, as of a Lease for Term of Years, or of a Ward, or such other, then the Matter should have come in Debate in the King's Court; and then I think the Judges there should judge after the Law of the Realm, and that is, that the younger Brother is Heir: and so methinketh the Diversity of the Courts shall make the Diversity of Judgment.

Stud. Of that might follow a great Inconvenience, as me seemeth, for it might be such a Case that both Chattels real and Chattels personal

sonal were in the Will, and then, after thine Opinion, the one Son should have the Chattels personal, and the other Son the Chattels real; and it cannot be conveniently taken, as methinketh, but that the Father's Will was, that the one Son should have all, and not be divided. Therefore methinketh that he shall be judged for Heir that is Heir by the Common Law, and that the Judges Spiritual in this Case be bound to take Notice what the Common Law is: for sith the Things that be in Variance be Temporal, that is to say, the Goods of the Father, it is Reason that the Right of them in this Realm shall be determined by the Law of the Realm.

Doct. How may that be? For the Judges Spiritual know not the Law of the Realm, ne they cannot know it as to the most Part of it; for much Part of the Law is in such Speech that few Men have the Knowledge of it, and there is no Means, ne Familiarity of Study between them that learn the said Laws; for they be learned in several Places, and after divers Ways, and after divers Manners of Teachings, and in divers Speeches, and commonly the one of them have none of the Books of the other: and to bind the Spiritual Judges to give Judgment after the Law that they know not, ne that they cannot come to the Knowledge of it, seemeth not reasonable.

Stud. They must do therein as the King's Judges must do when any Matter cometh before them that ought to be judged after the Spiritual Law, whereof I put divers Cases in our first Dialogue in English, the seventh

Chapter; that is to say, they must either take Knowledge of it by their own Study, or else they must enquire of them that be learned in the Law of the Church, what the Law is; and in like wise must they do. But it is to doubt, that some of them would be loth to ask any such Question in such Case, or to confess that they are bound to give their Judgment after the temporal Law: And surely they may lightly offend their Conscience.

Doct. I suppose that some be of Opinion that they are not bound to know the Law of the Realm; and verily, to my Remembrance, I have not heard that Judges of the Spiritual Law are bound to know the Law of the Realm.

Stud. And I suppose that they are not only bound to know the Law of the Realm, or to do that in them is to know it, when the Knowledge of it openeth the Right of the Matter that dependeth before them: But that they be also bound to know where and in what Case they ought to judge after it: For in such Cases they must take the King's Law as the Law Spiritual to that Point, and are bound in Conscience to follow it, as it may appear by divers Cases, whereof one is this. Two Jointenants be of Goods, and the one of them by his last Will bequeatheth all his Part to a Stranger, and maketh the other Jointenant his Executor, and dieth: If he to whom the Bequest is made sue the other Jointenant upon the Legacy as Executor, &c. upon this Matter shewed, the Judges of the Spiritual Law are bound to judge the Will to be void, because

cause it is void by the Law of the Realm, whereby the Jointenant hath Right to the whole Goods by the Title of the Survivor and is judged to have the Goods as by the first Gift, which is before the Title of the Will, and must therefore have Preferment as the eldest Title: And if the Judges of the Spiritual Court judge otherwise, they are bound to Restitution. And by like Reason the Executors of a Man that is outlawed at the Time of his Death may discharge themselves in the Spiritual Court of the performing of the Legacies, because they be chargeable to the King; and yet there is no such Law of Utlagary in the Spiritual Law.

Doct. By occasion of that thou hast said before I would ask of thee this Question. If a Parson of a Church alien a Portion of Dismes according as the Spiritual Law hath ordained, is not that Alienation sufficient, though it have not the Solemnities of the Temporal Law?

Stud. I am in Doubt therein, if the Portion be under the fourth Part of the Value of the Church: But if it be to the Value of the fourth Part of the Church or above, it is not sufficient, and therefore was the Writ of Right of Dismes ordained. And if in a Writ of Right of Dismes it be adjudged in the King's Court for the Patron of the Successor of him that alieneth, because the Alienation was not made according to the Common Law; then the Judges of the Spiritual Law are bound to give their Judgment according to the Judgment given in the King's Court. And in

like wise, if a Parson of a Church agree to take a Pension for the Tithe of a Mill, or if the Pension be to the fourth Part of the Value of the Church or above, then it must be aliened after the Solemnities of the King's Laws, as Lands and Tenements must; or else the Patron of the Successor of him that alieneth may bring a Writ of Right of Dismes, and recover in the King's Court; and then the Judges of the Spiritual Court are bound to give Judgment in the Spiritual Courts accordingly, as is aforesaid.

Doct. I have heard say that a Writ of Right of Dismes is given by the Statute of Westm. 2. and that speaketh only of Dismes, and not of Pensions.

Stud. Where a Parson of a Church is wrongfully deforced of his Dismes, and is let by an Indicavit to ask his Dismes in the Spiritual Court, then the Patron may have a Writ of Right of Dismes by the Statute that thou speakest of, for there lay none at the Common Law; for the Parson had there good Right, though he were let by the Indicavit to sue for his Right. But when the Parson had no Remedy at the Spiritual Law, there a Writ of Right of Dismes lay for the Patron by the Common Law, as well of Pensions as of Dismes: And some say that in such Case it lay of less than of the fourth Part, by the Common Law, but that I pass over. And the Reason why it lay at the Common Law, if the Dismes or Pensions were above the fourth Part, &c. was this: By the Spiritual Law the Alienation of the Parson with the Assent of the Bishop,

Bishop and of the Chapter shall bar the Successor without Assent of the Patron, and so the Patron might leese his Patronage, and be not assenting thereto; for his Incumbent might have no Remedy but in the Spiritual Court, and there he was barred: Wherefore the Patron in that Case shall have his Remedy by the Common Law, where the Assent of the Ordinary and Chapter without the Patron shall not serve, as it is said before. But where the Incumbent had good Right by the Spiritual Law, there lay no Remedy for the Patron by the Common Law, though the Incumbent were let by an Indicavit. And for that Cause was the said Statute made, and it lieth as well by the Equity for Offerings and Pensions, as for Dismes. Then, farther, I would think that where the Spiritual Court may hold Plea of a Temporal Thing, that they must judge after the Temporal Law, and that Ignorance shall not excuse them in that Case: For by taking of their Office they have bound themselves to have Knowledge of as much as belongeth to their Office, as all Judges be, Spiritual and Temporal. But if it were in Argument in this Case, whether the eldest Son might be a Priest, because he is a Bastard in the Temporal Law, that should be judged after the Spiritual Law, for the Matter is Spiritual.

Doct. Yet notwithstanding all the Reasons that thou hast made, I cannot see how the Judges of the Spiritual Law shall be compelled to take Notice of the Temporal Law; seeing that the most Part of it is in the French Tongue;

Tongue; for it were hard that every Spiritual Judge should be compelled to learn the Tongue. But if the Law of the Realm were set in such order, that they that intend to study the Law Canon might first have a Sight of the Law of the Realm, as they have now of the Law Civil, and that some Books and Treatises were made of Cases of Conscience concerning those two Laws, as there be now concerning the Law Civil and the Law Canon; I would assent that it were right expedient, and then Reason might serve the better, that they should be compelled to take Notice of the Law of the Realm, as they be now bound in such Countries as the Law Civil is used to take Notice of that Law.

Stud. Methinketh thine Opinion is right good and reasonable: But till such an Order be taken, they are bound, as I suppose, to enquire of them that be learned in the Common Law, what the Law is, and so to give their Judgment according, if they will keep themselves from Offence of Conscience. And forasmuch as thou hast well satisfied my Mind in all the Questions before, I pray thee now that I may somewhat feel thy Mind in divers Articles that be written in divers Books for the ordering of Conscience upon the Law Canon or Civil: For methinketh that there be divers Conclusions put in divers Books, as in the Sums called Summa Angelica and Summa Rosella, and divers other for the good Order of Conscience, that be against the Law of this Realm, and rather blind Conscience, then do give any Light to it.

Doct. I pray thee shew me some of those Cases.

Stud. I will with Good-will.

CHAP. XXVI.

¶ Whether the Abbot may with Conscience present to an Advowson of a Church that belongeth to the House, without Assent of the Covent?

IT appeareth in the Chapter, Et agnoscitur de his quæ fiunt a Prælatis, the which Chapter is recited in the Sum called Summa Angelica, in the Title Abbas, the xxvii Article, that he may not without any Custom or any special Privilege to help therein.

Stud. Truth it is that there is such a Decretal; but they that be learned in the Law of England hold the Decretal bindeth not in this Realm: And this is the Cause why they do hold that Opinion. By the Law of the Realm the whole Disposition of Lands and Goods of the Abbey is the Abbot's only for the Time that he is Abbot, and not in the Covent, for they be but as dead Persons in the Law: And therefore the Abbot shall sue and be sued only without the Covent, do Homage, Fealty, attuen, make Leases, and present to Advowsons only in his own Name. And they say farther, that this Authority cannot be taken

taken from him but by the Law of the Realm; and so they say, that the Makers of the Decretal exceed their Power; wherefore they say it is not to be holden in Conscience, no more than if a Decree were made that a Lease for Term of Years or at Will, made by the Abbot without the Covent, should be immediately void: And so they think that the Abbot may in this Case present in his own Name without Offence of Conscience, because the said Decretal holdeth not in this Realm.

Doct. But many be of Opinion, that no Man hath Authority to present in Right and Conscience to any Benefice with Cure but the Pope, or that he hath his Authority therein derived from the Pope: For they say, that forasmuch as the Pope is the Vicar-general under God, and hath the Charge of the Souls of all People that be in the Flock of Christ's Church, it is Reason that, sith he cannot minister to all, ne do that is necessary to all People for their Soul's Health in his own Person, that he shall assign Deputies for his Discharge in that Behalf. And because Patrons claim to present to Churches in this Realm by their own Right, without Title derived from the Pope, they say that they usurp upon the Pope's Authority. And therefore they conclude, that though the Abbot have Title by the Law of the Realm to present in this Case in his own Name, that yet, because that Title is against the Pope's Prerogative, that that Title, ne yet the Law of the Realm that maintaineth that Title, holdeth not in Conscience. And they say also that it belongeth to the

Law

Law-Canon to determine the Right of Presentment to Benefices, for it is a thing spiritual, and belongeth to the spiritual Jurisdiction, as the Deprivation from a Benefice doth: And so they say the said Decretal bindeth in Conscience, though in the Law of the Realm it bindeth not.

Stud. As to the first Consideration, I would right well agree, that if the Patrons of Churches in this Realm claimed to put Incumbents into such Churches as should fall void of their Patronage, without presenting them to the Bishop, or if they claimed that the Bishop should admit such Incumbent as they should present, without any Examination to be made of his Ability in that Behalf, that that Claim were against Reason and Conscience, for the Cause that thou hast rehearsed: But forasmuch as the Patrons in this Realm claim no more but to present their Incumbents to the Bishop, and then the Bishop to examine the Ability of the Incumbent, and if he find him by Examination not able to have Cure of Souls, he then to refuse him, and the Patron to present another that shall be able, and if he be able, then the Bishop to admit him, institute him and induct him; I think that this Claim and their Presentments thereupon stand with good Reason and Conscience. As to the second Consideration, it is holden in the Laws of the Realm, that the Right of Presentment to a Church is a temporal Inheritance, and shall descend by course of Inheritance from Heir to Heir, as Lands and Tenements shall, and shall be taken as Assets, as Lands and Tenements be: And for

the Trial of the Right of Patronages be ordained in the Law divers Actions for them that be wronged in that Behalf, as Writs of Right of Advowson, Assises of Darrein presentment, Quare impedit, and divers other, which alway without Time of Mind have been pleaded in the King's Courts as things pertaining to his Crown and Royal Dignity: And therefore they say that in this Case his Laws ought to be obeyed in Law and Conscience.

Doct. If it come in Variance whether he that is so presented be able or not able, by whom shall the Ability be tried?

Stud. If the Ordinary be not Party to the Action, it shall be tried by the Ordinary; but if he be Party, it shall be tried by the Metropolitan.

Doct. Then the Law is more reasonable in that Point than I thought it had been: But in the other Point I will take Advisement in it till another Time, and I pray thee shew me thy Mind in this Point. If an Abbot name his Covent with him in his Presentation, doth that make the Presentation void in the Law? Or is the Presentation good notwithstanding?

Stud. I think it is not void therefore, but the naming of them is void, and a thing more than needeth. For if the Abbot be disturbed, he must bring his Action in his own Name, without the Covent.

Doct. Then I perceive well that it is not prohibited by the Law of England, but that the Abbot may name the Covent in his Presentation with him, and also take their Assent whom he shall present, if he will: And then I hold

hold it the surest Way that he so do, for in so doing he shall not offend neither in Law nor Conscience.

Stud. To take the Assent of the Covent whom he shall present, and to name them also in the Presentation, knowing that he may do otherwise both in Law and Conscience, if he will, is no Offence: But if he take their Assent, or name them with him in the Presentation, thinking that he is so bound to do in Law and Conscience, setting a Conscience where none is, and regardeth not the Law of the Realm, that will discharge his Conscience in this Behalf, if he will, so that he present an able Man, as he may do, without their Assent; there is an Error and Offence of Conscience in the Abbot. And in like wise, if the Abbot present in his own Name, and therefore the Covent saith that he offendeth in Conscience, in that he observeth not the Law of the Church, for that he taketh not their Assent; then they offend in judging him to offend that offendeth not. And therefore the sure Way is in this Case to judge both the said Laws of such Effect as they be, and not to set an Offence of Conscience by breaking of the said Decree, which standeth not in Effect in this Behalf within this Realm.

CHAP.

CHAP. XXVII.

¶ If a Man find Beasts in his Ground doing hurt, whether may he by his own Authority take them and keep them till he be satisfied of the Hurt?

This Question is made in the Sum called Summa Rosella, in the Title of Restitution, that is to say, Restitutio 13. the 9th Article: And there it is answered, that he may not take them for to hold them as a Pledge till he be satisfied for the Hurt; but that he may take them and keep them till he know who oweth them, that he may thereby learn against whom to have his Remedy. Is not the Law of the Realm so in like wise?

Stud. No verily, for, by the Law of the Realm, he that in that Case hath the Hurt may take the Beasts as a Distress, and put them in a Pound overt, so it be within the said Shire, and there let them remain till the Owner will make him amends for the Hurt.

Doct. What callest thou a Pound overt?

Stud. A Pound overt is not only such a Pound as is commonly made in Towns and Lordships, for to put in Beasts that be distrained, but it is also every Place where they may be in lawfully, not making the Owner an Offender for their being there: And that it be there also, that the Owner may lawfully give the Beasts Meat and Drink while they be in Pound.

Doct.

Doct. And if they die in the Pound for lack of Meat, whose Jeopardy is it?

Stud. If it be such a Pound overt as I speak of, it is at the Peril of him that oweth the Beasts, so that he that had the Hurt shall be at Liberty to take his Action for the Trespass, if he will: And if it be not a lawful Pound, then it is at the Peril of him that distrained; and so it is if he drive them out of the Shire, and they die there.

Doct. I put the Case that he that oweth the Beasts offer sufficient Amends, and the other will not take it, but keepeth the Beasts still in Pound, may not the Owner take them out?

Stud. No, for he may not be his own Judge; and if he do, an Action lieth against him for breaking of the Pound: But he must sue a Replevin, to have his Beasts delivered him out of the Pound, and thereupon it shall be tried by 12 Men, whether the Amends that was offered were sufficient or not: And if it be found that the Offer was not sufficient, then he that hath the Hurt shall have such Amends as the 12 Men shall assess.

Doct. If it be found by the 12 Men that the Amends were sufficient, shall he that refuseth to take it have no Punishment for his Refusal, and for keeping of the Beasts in Pound after that Time?

Stud. I think no, but that he shall yield Damages in the Replevin, because the Issue is tried against him.

Doct. I put the Case that the Beasts after the Refusal die in Pound for lack of Meat, at whose Jeopardy is it then?

Stud. At the Jeopardy of him that owed the Beasts, as it was before: For he is bound at his Peril, by reason of the Wrong that was done at the Beginning, to see that they have Meat as long as they shall be in Pound, unless the King's Writ come to deliver them, and he resisteth it; for after that Time it will be at his Jeopardy if they die for lack of Meat, and the Damage shall be recovered in an Action brought upon the Statute for disobeying the King's Writ.

CHAP. XXVIII.

¶ Whether a Gift made by one under the Age of twenty-five Years be good.

Doct. It appeareth in Summa Angelica in the Title Donatio prima, the 7th Article, that a Man before the Age of 25 Years may not give, without it be with the Authority of his Tutor: Is it not so likewise at the Common Law?

Stud. The Age of Infants to give or sell their Lands and Goods in the Law of England is at 21 Years, or above; so that after that Age the Gift is good, and before that Age it is not good, by whose Assent soever it be, except it be for his Meat, and his Drink, or Apparel, or that he do it as Executor, in Performance of the Will of his Testator, or in some other like Cases, that need not to be rehearsed here: And that Age must be observed in this Realm in Law and Conscience, and not the said Age of 25 Years.

Doct. I put case it were ordained by a Decree of the Church, that if any Man by his Will bequeatheth Goods to another, and willeth that they

shall be delivered to him at his full Age, and that in that Case 25 Years shall be taken for the full Age; shall not that Decree be observed and stand good after the Law of England?

Stud. I suppose it shall not. For though it belong to the Church to have the Probate and the Execution of Testaments made of Goods and Chattels, except it be in certain Lordships and Seigniories that have them by Prescription; yet the Church may not, as me seemeth, determine what shall be the lawful Age for another Person to have the Goods, for that belongeth to the King and his Laws to determine. And therefore if it were ordained by a Statute of the Realm, that he should not in such case have the Goods till he were of the Age of 25 Years, that Statute were good, and to be observed as well in the spiritual Law as in the Law of the Realm: and if a Statute were good in that Case, then a Decree made thereof is not to be observed; for the ordering of the Age may not be under two several Powers; and one Property of every good Law of Man is, that the Maker exceed not his Authority: And I think that the spiritual Judge in that Case ought to judge the full Age after the Law of the Realm, seeing that the Matter of the Age concerneth temporal Goods. And I suppose farther, that as the King by Authority of his Parliament may ordain that all Wills shall be void, and that the Goods of every Man shall be disposed in such Manner as by Statute should be assigned, that more stronger he may appoint at what Age such Wills as be made shall be performed.

Doct. Thinkest thou then that the King may take away the Power of the Ordinary, that he shall not call Executors to accompt?

Stud. I am somewhat in doubt therein: But it seemeth that if it might be enacted by Statute that all Wills should be void, as is aforesaid, that then it might be enacted, That no Man should have Authority to call none to accompt upon such Wills, but such as the Statute shall therein appoint, for he that may do the more, may do the less. Notwithstanding I will nothing speak determinately in that Point at this Time; ne I mean not that it were good to make a Statute that all Wills should be void, for I think them right expedient: But mine Intent is, to prove that the Common Law may ordain the Time of the full Age as well in Wills of temporal things as otherwise, and also that Wills shall be made; and if it may so do, then much stronger it belongeth to the King's Laws to interpret Wills concerning temporal things, as well when they come in Argument before his Judges, as when they come in Argument before spiritual Judges, and that they ought not to be judged by several Laws, (that is to say) by the spiritual Judges in one Manner, and by the King's Judges in another Manner.

CHAP.

CHAP. XXIX.

¶ If a Man be convict of Heresie, before the Ordinary, whether his Goods be forfeited.

Doct. IT appeareth in Summa Angelica, in the Title Donatio prima, the 13 Article, that he that is a Heretick may not make Executors; for in the Law his Goods be forfeit: What is the Law of the Realm therein?

Stud. If a Man be convict of Heresie, and abjure, he hath forfeit no Goods; but if he be convicted of Heresie, and be delivered to Laymens hands, then hath he forfeit all his Goods that he hath at that Time that he is delivered to them, though he be not put in Execution for the Heresie: But his Lands he shall not forfeit except he be dead for the Heresie, and then he shall forfeit them to the Lords of the Fee, as in Case of Felony, except they be holden of the Ordinary, for then the King shall have the Forfeiture; as it appeareth by the Stat. made the second Year of H. 5. c. 7.

Doct. Methinketh that, as it belongeth only to the Church to determine Heresies, that so it belongeth to the Church to determine what Punishment he shall have for his Heresie, except Death, which they may not be Judges in: But if the Church decree that he shall therefore forfeit his Goods, methinketh that they be forfeit by that Decree.

Stud. Nay verily, for they be temporal, and belong to the Judgment of the King's Court: And I think the Ordinary might have set

set no Fine upon one impeached of Heresie, till it was ordained by the Statute of H. 4. that he may set a Fine in that Case, if he see Cause; and then the King shall have that Fine, as in the said Statute appeareth.

CHAPTER XXX.

¶ Where divers Patrons of an Advowson, and the Church voideth, the Patrons vary in their Presentments, whether the Bishop shall have liberty to present which of the Incumbents that he will, or not?

Doct. This Question is asked in Summa Rosella, in the Title Patronus, the ninth Article; and there it appeareth by the better Opinion, that he may present whether Clerk he will: Howbeit the Maker of the said Sum saith, by the Rigor of the Law, the Bishop in such Case may present a Stranger, because the Patrons agree not. And in the same Chap. Patronus, the 15 Article, it is said that he must be preferred that hath the most Merits, and hath the most Part of the Patrons: And if the Number be equal, that then it is to consider the Merits of the Patron: And if they be of like Merit, then may the Bishop command them to agree, and to present again: And if they cannot yet agree, then the Liberty to present is given to the Bishop to take which he will: And if he may not yet present without great Trouble, then shall the Bishop order the Church in the best Manner he can: And if he cannot order it, then shall he suspend the Church, and take away

away the Relicks, to the Rebukes of the Patrons: And if they will not be so ordered, then must he ask help of the Temporalty. And in the 15 Article of the said Title Patronus, it is asked, Whether it be expedient in such Case, that the more Part of the Patrons agree, having Respect to all the Patrons, or that it suffice to have the more Part in Comparison of the less Part? as thus; There be four Patrons to present one Clerk: The first and second present one, the third presenteth another, and the fourth another: He that is presented by two hath not the more Part in Comparison of all the Patrons, for they be equal; but he hath the more Part having Respect to the other Presentments. To this Question it is answered, That either the Presentment is made of them that be of the College, and there is requisite the more Part having Respect to all the College; or else every Man presenteth for himself as commonly do Lay-men that have the Patronage of their Patrimony, and then it sufficeth to have the more Part in Respect of the other Parties. Doth not the Law of England agree to these Diversities?

Stud. No verily.

Doct. What Order then shall be taken in the Law of England, if the Patrons vary in their Presentments?

Stud. After the Laws of England this order shall be taken: If they be Jointenants or Tenants in Common of the Patronage, and they vary in Presentment, the Ordinary is not bound to admit none of their Clerks, neither the more Part nor the less; and if the

six Months pass or they agree, then he may present by the Lapse: But he may not present within the six Months, for if he do, they may agree and bring a Quare Impedit against him, and remove his Clerk, and so the Ordinary shall be a Disturber. And if the Patrons have the Patronage by Descent as Coparceners, then is the Ordinary bound to admit the Clerk of the eldest Sister, for the eldest shall have the Preferment in the Law, if she will; and then at the next Avoidance the next Sister shall present; and so by turn one Sister after another, till all the Sisters or their Heirs have presented, and then the eldest Sister shall begin again. And this is called a Presenting by Turn, and it holdeth alway between Coparceners of an Advowson, except they agree to present together, or that they agree by Composition to present in some other Manner; and if they do so, the Agreement must stand. But this must be always except, that if at the first Avoidance that shall be after the Death of the Common Ancestor, the King have the Ward of the youngest Daughter, that then the King by his Prerogative shall have the Presentment, and at the next Avoidance the eldest Sister, and so by turn. And it is to understand, that if after the Death of the Common Ancestor the Church voideth, and the eldest Sister presented together with another of the Sisters, and the other Sisters every one in their own Name or together; that in that Case the Ordinary is not bound to receive none of their Clerks, but may suffer the Church to run into the Lapse, as it is said before; for he shall not be bound to receive the

Clerk

Clerk of the eldest Sister, but where she presenteth in her own Name. And in this Case where the Patrons vary in Presentment, the Church is not properly said Litigious, so that the Ordinary should be bound at his Peril to direct a Writ to enquire de jure Patronatus; for that Writ lieth where two present by several Titles, but these Patrons present all in one Title, and therefore the Ordinary may suffer it to pass, if he will, into the Lapse. And this Manner of Presentments must be observed in this Realm in Law and Conscience.

CHAP. XXXI.

¶ How long Time the Patron shall have to present to a Benefice.

Doct. This Question is asked in Summa Angelica, in the Title Jus Patronatus, the 16 Article; and there it is answered, That if the Patron be a Lay-man, that he shall have four Months, and if he be a Clerk he shall have six Months.

Stud. And by the Common Law he shall have six Months whether he be a Lay-man or a Clerk. And I see no Reason why a Clerk should have more respite than a Lay-man, but rather the contrary.

Doct. From what Time shall the six Months be accompted?

Stud. That is in divers Manners, after the Manner of the Avoidance: For if the Church void by Death, Creation or Cession, the six Months

shall be counted from the Death of the Incumbent, or from the Creation or Cession, whereof the Patron shall be compelled to take Notice at his Peril: And if the Voidance be by Resignation or Deprivation, then the six Months shall begin when the Patron hath Knowledge given him by the Bishop of the Resignation or Deprivation.

Doct. What if he have Knowledge of the Resignation or Deprivation, and not by the Bishop, but by some other? Shall not the six Months begin then from the Time of that Knowledge?

Stud. I suppose that it shall not begin till he have Knowledge given him by the Bishop.

Doct. An Union is also a Cause of Voidance: How shall the six Months be reckoned there?

Stud. There can be no Union made but the Patrons must have Knowledge, and it must be appointed who shall present after that Union, that is to say, one of them or both, either jointly or by turn one after another, as the Agreement is upon the Union; and sith the Patron is privy to the Avoidance, and is not ignorant of it, the six Months shall be accounted from the Agreement.

Doct. I see well, by the Reason that thou hast made in this Chapter, That Ignorance sometime excuseth in the Law of England; for in some of the said Avoidances, it shall excuse the Patrons, as it appeareth by the Reasons above, and in some it will not: Wherefore I pray thee shew me somewhat where Ignorance excuseth in the Law of England, and where not, after thine Opinion.

Stud.

Stud. I will with good-will hereafter do as thou sayest, if thou put me in Remembrance thereof. But I would yet move thee somewhat farther in such Questions as I have moved thee before, concerning the Diversities between the Laws of England and other Laws: For there be many more Cases thereof that, as me seemeth, have right great need, for the good Order of Conscience of many Persons, to be reformed, and to be brought into one Opinion, both among Spiritual and Temporal. As it is in the Case where Doctors hold Opinion, that the Statute of Lay-men, that restrains Liberty to give Lands to the Church, should be void; and they say farther, that if it were prohibit by a Statute that no Gift should be made to Foreigners, that yet a Gift made to the Church should be good; for they say that the Inferior may not take away the Authority of the Superior: And this saying is directly against the Statutes, whereby it is prohibit that Lands should not be given into Mortmain. And they say also that Bequests and Gifts to the Church must be determined after the Law Canon, and not after the Laws and Statutes of Lay-men: And so they regard much to whom the Gift is made, whether to the Church, or to make Causeways, or to common Persons, and bear more favour in Gifts to the Church than to the other. And the Law of the Realm beholdeth the Thing that is given and intended, that if the Thing that is given be of Lands or Goods, that the Determination thereof of Right belongeth in this Realm to the King's Laws, whether it be to Spiritual

Men or Temporal, to the Church or to other: And so is great Division in this Behalf, when one preferreth his Opinion, and another his, and one this Jurisdiction, and another that; and that, as it is to fear, more of Singularity than of Charity. Wherefore it seemeth that they that have the greatest Charge over the People, specially to the Health of their Souls, are most bound in Conscience before other to look to this Matter, and to do that in them is, in all Charity to have it reformed, not beholding the Temporal Jurisdiction or Spiritual Jurisdiction, but the Common Wealth and Quietness of the People: And that undoubtedly would shortly follow, if this Division were put away, which I suppose verily will not be, but that all Men within the Realm, both Spiritual and Temporal be ordered and ruled by one Law in all Things Temporal. Notwithstanding forasmuch as the Purpose of this Writing is not to treat of this Matter, therefore I will no farther speak thereof at this Time.

Doct. Then I pray thee proceed to another Question, that thou sayest thy Mind is to do.

Stud. I will with good-will.

CHAP.

CHAP. XXXII.

¶ If a Man be Excommenged, Whether he may in any Case be assoiled without making Satisfaction?

IN the Sum called Summa Rosella, in the Title Absolutio quarta, the second Article, it is said that he that is Excommunicate for a Wrong, if he be able to make Satisfaction, ought not to be assoiled, but he do satisfie; and that they offend that do assoil him, but yet nevertheless he is assoiled; and if he be not able to make Amends, that he must yet be assoiled, taking a sufficient Gage to satisfie if he be able hereafter, or else that he make another to satisfie, if he be able. And these Sayings in many Things hold not in the Laws of England.

Doct. I pray thee shew wherein the Law of the Realm varieth therefrom.

Stud. If a Man be Excommunicate in the Spiritual Court for Debt, Trespass, or such other Things as belong to the King's Crown and to his Royal Dignity, there he ought to be assoiled without making any Satisfaction, for the Spiritual Court exceedeth their Power in that they held Plea in those Cases, and the Party, if he will, may thereupon have a Præmunire facias, as well against the Party that sued him as against the Judge: And therefore in this Case they ought in Conscience to make Absolution without any Satisfaction, for they not only offended the Party, in calling

calling him to answer before them of such Things as belong to the Law of the Realm, but also the King; for he, by Reason of such Suits, may leese great Advantages by the Reason of the Writs Originals, Judicials, Fines, Amerciaments, and such other Things as might grow to him, if Suits had been taken in his Courts according to his Laws. And according to this saying it appeareth in divers Statutes, that if a Man lay violent Hands upon a Clerk, and beat him, that for the beating Amends shall be made in the King's Court; and for the laying of violent Hands upon the Clerk, Amends shall be made in the Court-christian. And therefore if the Judge in the Court-christian would award the Party to yield Damages for the beating, he did against the Statute. But admit that a Man be Excommenged for a Thing that the Spiritual Court may award the Party to make Satisfaction of, as for the not inclosing of the Church-yard, or for not apparelling of the Church conveniently; then I think the Party must make Restitution, or lay a sufficient Caution, if he be able, or he be assoiled: But if the Party offer sufficient Amends, and have his Absolution, and the Judge will not make him his Letters of Absolution, if the Excommengement be of Record in the King's Court, then the King may write unto the Spiritual Judge, commanding him that he make the Party his Letters of Absolution upon Pain of Contempt: And if the said Excommunication be not of Record in the King's Court, then the Party may in such Case have his Action against the Judge Spiritual, for that he would not make him his Letters

of Absolution. But if he be not assoiled, or if he be not able to make Satisfaction, and therefore the Judge Spiritual will not assoil him, what the King's Laws may do in this Case I am somewhat in doubt, and will not much speak of it at this Time; but, as I suppose, he may as well have his Action in that Case for the not assoiling him, as where he is assoiled, and that the Judge will not make him his Letters of Absolution. And I suppose the same Law to be, where a Man is accursed for a Thing that the Judge had no Power to accurse him in, as for Debt, Trespass, or such other.

Doct. There he may have other Remedies, as a Præmunire facias, or such other: And therefore I suppose the other Action lieth not for him.

Stud. The Judge and the Party may be dead, and then no Præmunire lieth; and though they were alive, and were condemned in Præmunire, yet that should not avoid the Excommengement: And there I think the Action lieth, specially if he be thereby delayed of Actions that he might have in the King's Court if the said Excommengement had not been.

CHAP. XXXIII.

¶ Whether a Prelate may refuse a Legacy.

It is moved in the said Sum named Rosella, in the Title Alienatio 20. the 11 Article, whether a Prelate may refuse a Legacy? Wherein divers Opinions be recited there, which

as methinketh, had need after the Laws of the Realm to be more plainly declared.

Doct. I pray thee shew me what the Law of the Realm will therein.

Stud. I think that every Prelate and Sovereign that may only sue and be sued in his own Name, as Abbots, Priors, and such other, may refuse any Legacy that is made to the House; for the Legacy is not perfect till he to whom it is made assent to take it: For else, if he might not refuse it, he might be compelled to have Lands, whereby he might in some Case have great Loss. But that if he intend to refuse, he must, as soon as his Title by the Legacy falleth, relinquish to take the Profits of the Thing bequeathed; for if one take the Profits thereof, he shall not after refuse the Legacy; but yet his Successor may, if he will refuse the taking of the Profits, to save the House from yielding Damages, or from Arrerages of Rents, if any such be. And like Law is of a Remainder as is in Legacy, For though in the Case of a Remainder, and also of a Devise, as most men say, the Freehold is cast upon him by the Law, when the Remainder or Devise falleth: Yet it is in his liberty to refuse the taking of the Profits, and to refuse the Remainder, if he will, as he might do of a Gift of Lands or Goods. For if a Gift be made to a Man that refuseth to take it, the Gift is void; and if it be made to a Man that is absent, the Gift taketh no Effect in him till he assent: No more than if a Man disseise one to another Man's Use, he to whose Use the Disseisin is made, hath nothing in the Land

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ne is no Disseisor, till he agree. And to such Disseisins and Gifts an Abbot or Prior may disagree, as well as another Man. But after some Men a Bishop, of a Devise or Remainder that is made to the Bishop and to the Dean and Chapter, nor a Dean and Chapter of a Devise or Remainder made to them, ne yet the Master of a College of such a Devise or Remainder made to him and to his Brethren, may not disagree without the Chapter or Brethren: for the Bishop of such Land as he hath with the Dean and Chapter, ne the Dean nor Master of such Land as they have with the Chapter and Brethren, may not answer without the Chapter and Brethren: And therefore some say, that if the Dean or Master will refuse or disclaim in the Lands that they have by the Devise or Remainder, that Disclaimer without the Chapter or Brethren is void. And therefore it is holden in the Law, that if a Bishop be vouched to Warrant, and the Tenant bindeth him to the Warranty by Reason of a Lease made to him by the Bishop, and by the Dean and the Chapter, yielding a Rent, that in that Case the Bishop may not disclaim in the Reversion without the assent of the Dean and Chapter: But yet if a Reversion were granted to a Dean and a Chapter, and the Dean refuse, the Grant is void. And so it appeareth that the Dean may refuse to take a Gift or Grant of Lands or Goods, or of a Reversion made to him and to the Chapter; and yet he may not disagree to a Remainder or Devise. And the Diversity is, because the Remainder, and Devise be cast upon him without

any Assent, whereupon neither the Dean or the Chapter by themselves may in no wise disagree without the Assent of the other: But a Gift or Grant is not good to them without they both assent. And in such Gifts, as I suppose, an Infant may disagree as well as one of full Age: But if a Woman-covert disagree to a Gift, and the Husband agree, that Gift is good.

Doct. What if the Lands in that Case of a Man and his Wife be charged with Damages, or be charged with more Rent than the Land is worth, and the Husband die; shall the Wife be charged to the Damages or to the Rent?

Stud. I think nay, if the Wife refuse the Occupation of the Ground after her Husband's death. And I think the same Law to be, if a Lease be made to the Husband and the Wife yielding a greater Rent than the Land is worth, that the Wife after the Husband's death may refuse the Lease, to save her from the Payment of the Rent: And so may the Successor of an Abbot.

Doct. And if the Husband in that Case outlive the Wife, and then make his Executors and die, whether may his Executors in like wise refuse the Lease?

Stud. If they have Goods sufficient of their Testator to pay the Rent, I think they may not refuse it: But if they have not Goods sufficient of their Testator to pay the Rent to the end of the Term, I think, if they relinquish the Occupation, they may by special Pleading discharge themselves of the Rent and the Lease, and if they do not, they may lightly charge them-

themselves of their own Goods. And if a Lease be made for Term of Life, the Remainder to an Abbot for Term of Life of John at Stile, reserving a greater Rent than the Land is worth, and after the Tenant for Term of Life dieth; the Abbot may refuse the Remainder, for the Cause before rehearsed: And in case that the Abbot assent to the Remainder, whereby he is charged to the Rent during the Time that he is Abbot, and after he dieth or is deposed, living the said John at Stile, in that Case his Successor may discharge himself, by refusing the Occupation of the Land as is aforesaid. But I think that if such a Remainder were made to a Dean and to the Chapter, and the Dean agree without the Assent of the Chapter, that in that Case the Dean and the Chapter may afterwards disagree to the Remainder, and that the Act of the Dean without the Assent of the Chapter shall not charge the Chapter in that behalf. And thus it appeareth, though the Meaning of the said Chapter and Article in the said Sum be, that a Prelate may not disagree unto a Legacy for hurting of the House, yet he may after the Laws of the Realm disagree thereto where it should hurt his House. And if in a Præcipe quod reddat there be but one Tenant, be he Spiritual or Temporal, and he refuse by way of Disclaimer, in such Case where he may disclaim by the Law; there the Land shall vest in the Demandant: And if there be two Tenants, then it shall vest in his Fellow, if he will take the whole Tenancy upon him, or else it shall vest in the Demandant. But if an Abbot or Layman refuse

fuse the taking of the Profits, and shew a special Cause why it should hurt him if he do assent, and be thereby discharged, as is said before; in whom the Land shall then vest it is more doubt, whereof I will no farther speak at this Time. And thus it appeareth by divers of the Cases that be put in this Chapter, that he that is ignorant in the Law of the Realm shall lack the true Judgment of Conscience in many Cases. For in many of these Cases what may be done therein by the Law, must also be observed in Conscience, &c.

CHAP. XXXIV.

¶ Whether a Gift made under a Condition be void, if the Sovereign only break the Condition.

IN Summa Rosella, in the Title Alienatio, the 12 Article, is asked this Question, Whether a Gift made under a certain Form may be avoided or revoked, because the Prelate or Sovereign only did break the Form? And it is there answered, That it may not, for that the Deed of the Prelate only ought not to hurt the Church: And if those Words (under a Manner) be understood of a Gift upon Condition, as they seem to be, then the said Solution holdeth not in this Realm neither in the Law nor Conscience.

Doct. What is then the Law of England if a Man infeoff an Abbot by Deed indented, upon Condition that if the Abbot pay not to the Feoffor a certain Sum of Money at such a Day, that then

then it shall be lawful to the Feoffor to re-enter, and at that Day the Abbot faileth of his Payment; may the Feoffor lawfully re-enter, and put out the Abbot?

Stud. Yes verily, for he has no Right to the Land but by the Gift of the Feoffor, and his Gift was conditional; and therefore if the Condition be broken, it is lawful by the Law of England for the Feoffor to re-enter, and to take his Land again, and to hold it as in his first Estate: By which Re-entry, after the Laws of the Realm, he disproveth the first Livery of Seisin, and all the mesne Acts done between the first Feoffment and the Re-entry. And it forceth little in the Law, in whom the Default be that the Condition was not performed, whether in the Abbot, or in his Covent, or in both, or in any other Person whatsoever he be, except it be in the Feoffor himself. And it is great Diversity between a clear Gift made to an Abbot without Condition, and where it is made with Condition: For when it is made without Condition, the Act of the Abbot only shall not by the Common Law disherit the House, but it be in very few Cases. But yet upon divers Statutes the Sufferance of the Abbot only may disherit the House, as by his Cesser, or by levying a Cross upon a House against the Statute thereof made, in which Case the House thereby shall leese the Land: And some say that by the Common Law upon his Disclaimer in Avowry a Writ of Right of Disclaimer lieth. But if the Gift be upon Condition, it standeth neither with Law nor Conscience that the Abbot should have any more

more perfect or sure Estate than was given unto him: And therefore as the said Estate was made to the House upon Condition, so that Estate may be avoided for not performing of the Condition. And I think verily, that this I have said is to be holden in this Realm both in the Law and Conscience, and that the Decrees of the Church to the contrary bind not in this Case. But if the Lands be given to an Abbot and to his Covent, to the Intent to find a Lamp, or to give certain Alms to poor Men; though the Intent be not in those Cases fulfilled, yet the Feoffor nor his Heir may not reenter; for he reserved no Re-entry by express Words: Ne in the Words, when he said, to the Intent to find a Lamp, or to give Alms, &c. is implied no Re-entry: Ne the Feoffor nor his Heirs shall have no Remedy in such Cases, unless it be within the Case of the Statute of Westminster the second, that giveth the Cessavit de Cantaria.

CHAP. XXXV.

¶ Whether a Covenant made upon a Gift to the Church, that it shall not be aliened, be good.

IN the said Sum, called Summa Rosella, the said Title Alienatio, the 13 Article, is asked this Question, Whether a Covenant made upon a Gift to the Church, that it shall not be aliened, be good? And the same Question is moved again in the said Summa called Rosella, in the Title Conditio, the first Article, and

and in Summa Angelica, in the Title Donatio prima, the 51 and 52 Articles. And the Intent of the Question there is, Whether notwithstanding that the Condition be good to some Alienations, whether that yet it be good to restrain Alienations for the Redemption of them that be in Captivity under the Infidels, or for the greater Advantage of the House? And though the better Opinion be there, that the Condition may not be broken for Redemption of them that be in Captivity; yet it is in manner a whole Opinion that it may be sold for the greater Advantage to the House: For it is said there, that it may not be taken but that the Intent of the Giver was so; and therefore they call the Condition that prohibiteth it to be sold Conditio turpis, that is to say, a vile Condition: Wherefore they regard it not. But verily, as I take it, if a Condition may restrain any manner of Alienations, then it shall as well restrain Alienations for the two Causes before rehearsed, as for any other Causes: And though methinketh that the Condition is good, and after the Law of the Realm, that upon Gifts to the Church Alienation is restrained; yet I shall touch one Reason that is made to the contrary, that is this. There is a clear Ground in the Law, that if a Feoffment be made to a common Person in Fee, upon Condition that the Feoffee shall not alien to no Man; that Condition is void, because it is contrary to the Estate of a Fee-simple, to bind him that hath the Estate that he should not alien if he list. And some say that an Abbot that hath Land to him and to his Successors hath as high and

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as perfect a Fee-simple as hath a Lay-man that hath Land to him and to his Heirs; and therefore they say, that it is as well against the Law of the Realm to prohibit that the Abbot shall not alien, as it is to prohibit a Lay-man thereof. And though it be therein true as they say as to the Highness of the Estate, yet methinketh there is a great Diversity between the Cases concerning their Alienations. For when Lands be given in Fee-simple to a common Person, the Intent of the Law is that the Feoffee shall have Power to alien, and if he do alien, it is not against the Intent of the Law, ne yet against the Intent of the Feoffor; but when Lands be given to an Abbot and to his Successors, the Intent of the Law is, and also of the Giver, (as it is to presume) that it should remain in the House for ever; and therefore it is called Mortmain, that is to say, a dead Hand, as who saith, that it shall abide there alway as a thing dead to the House. And therefore, as I suppose, the Law will suffer that Condition to be good, that is made to restrain that such Mortmain should not be aliened; and that yet it may prohibit the same Condition to be made upon a Feoffment made in Fee-simple to a Man and to his Heirs: For that is the most high, the most free, and the most pure Estate that is in the Law. But the Law suffereth such a Condition to be made upon a Gift in tail, because the Statute prohibiteth that no Alienation should be made thereof. And then, as the Law suffereth such a Condition upon a Gift in Mortmain, that is to say, that it shall not be aliened, to be good; so it judgeth the Condition also according to the Words: That is to say, if the Condition be ge-

neral,

neral, that they shall not alien to no Man, as this Case is, that it shall be taken generally according to the Words, and it shall not be taken that the Intent of the Giver was otherwise than he expressed in his Gift: Though percase if he were alive himself, and the Question were askd him, whether he would be contented it should be aliened for the said two Causes or not, he would say yea; but when he is dead no Man hath Authority to interpret his Gift otherwise than the Law suffereth, nor otherwise than the Words of the Gift be. And if the Condition be special, that is to say, that the Land shall not be aliened to such a Man or such a Man, then the Condition shall be taken according to the Words, and then they may be aliened as for that Condition to any other but to them to whom it is expressly prohibited that the Land should not be aliened to. And if the Lands in that Case be aliened to one that is not excepted in the Condition, than he may alien the Land to him that is first excepted without breaking of the Condition; for Conditions be taken strictly in the Law, and without Equity. And thus methinketh, that because the said Condition is general, and restraineth all Alienations, that it may not be aliened neither by the Law of the Realm, ne yet by Conscience, no more for the said two Causes, than it may for any other Cause. And this Case must of Necessity be judged after the Rules and Grounds of the Law of the Realm, and after no other Law, as me seemeth.

CHAP.

CHAP. XXXVI.

¶ If the Patron present not within six Months, who shall present.

IN the same Sum called Summa Rosella, in the Title Beneficium, in principio, it is asked, If the Patron present not within six Months, who shall present, and within what Time the Presentment must be made? And it is answered there, that if the Patron present not within six Months, that the Chapter shall have six Months to present; and if the Chapter present not within six Months, that then the Bishop shall have other six Months; and if he be negligent, then the Metropolitan shall have other six Months; and if he present not, then the Presentment is devoulte to the Patriarch; and if the Metropolitan have no Superior under the Pope, then the Presentment is devoulte to the Pope. And so, as it is said there, the Archbishop shall supply the Negligence of the Bishop, if he be not exempt; and if he be exempt, the Presentment immediately shall fall from the Bishop to the Pope. And, as I suppose, these Diversities hold not in the Laws of the Realm.

Doct. Then, I pray thee, shew me who shall present by the Laws of the Realm, if the Patron do not present within six Months.

Stud.

Stud. Then for Default of the Patron the Bishop shall present, unless the King be Patron; and if the Bishop present not within six Months then the Metropolitan shall present, whether the Bishop be exempt or not: and if the Metropolitan present not within the Time limited by the Law, then there be divers Opinions who shall present, for some say the Pope shall present, as it is said before, and some say the King shall present.

Doct. What Reason make they that say the King should present in that Case?

Stud. This is their Reason; they say that the King is Patron paramount of all the Benefices within the Realm. And they say farther, that the King and his Progenitors, Kings of England, without Time of Mind, have had Authority to determine the Right of Patronages in this Realm in their own Courts, and are bound to see their Subjects have Right in that Behalf within the Realm, and that in that Case from him lieth no Appeal. And then they say, that if the Pope in this Case should present, that then the King should not only leese his Patronage paramount, but also that he should not sometime be able to do Right to his Subjects.

Doct. In what Case were that?

Doct. It is in this Case: The Law of the Realm is, That if a Benefice fall void, then the Patron shall present within six Months; and if he do not, that then the Ordinary shall present: But yet the Law is farther in this Case, that if the Patron present before the Ordinary put in his Clerk, that then the

the Patron of Right shall enjoy his Presentment; and so it is though the Time should fall after to the Metropolitan, or to the Pope. And if the Presentment should fall to the Pope, then though the Advowson abode still void, so that the Patron might of Right present, yet the Patron should not know to whom he should present, unless he should go to the Pope, and so he should fail of Right within the Realm. And if percase he went to the Pope, and presented an able Clerk unto him, and yet his Clerk were refused, and another put in at the Collation of the Pope, or at the Presentment of a Stranger; yet the Patron could have no Remedy for the Wrong within the Realm, for the Incumbent might abide still out of the Realm. And therefore the Law will suffer no Title in this Case to fall to the Pope. And they say, that for a like Reason it is, that the Law of the Realm will not allow an Excommengement that is certified into the King's Court under the Pope's Bulls: For if the Party offered sufficient Amends, and yet could not obtain his Letters of Absolution, the King should not know to whom to write for the Letters of Absolution, and the Party could not have Right; and that the Law will in no wise suffer.

Doct. The Patron in that Case may present to the Ordinary, as long as the Church is void; and if the Ordinary accept him not, the Patron may have his Remedy against him within this Realm. But if the Pope will put in an Incumbent before the Patron

tron present, it is Reason that he have the Presentment, as me seemeth, before the King.

Stud. When the Ordinary hath forceffed his Time, he hath lost his Power as to the Presentment, specially if the Collation be devolute to the Pope. And also when the Presentment is in the Metropolitan, he shall put in the Clerk himself, and not the Ordinary. And so there is no Default in the Ordinary, though he present not the Clerk of the Patron, if his Time be past; and so there lieth no Remedy against him for the Patron.

Doct. Though the Incumbent abide still out of the Realm, yet may a Quare impedit lie against him within the Realm: And if the Incumbent make Default upon the Distress, and appear not to shew his Title, then the Patron shall have a Writ to the Bishop according to the Statute, and so is not without Remedy.

Stud. But in this Case he cannot be summoned, attached, nor distrained, within the Realm.

Doct. He may be summoned by the Church, as the Tenant may in a Writ of Right of Advowson.

Stud. There the Advowson is in Demand, and here the Presentment is only in Debate; and so he cannot be summoned by the Church here, no more than if it were in a Writ of Annuity, and there the common Return is, quod Clericus est beneficiatus, non habens Laicum feod' ubi potest summoneri. And though he might be summoned in the Church, yet he might neither be attached nor distrained there;

there; and so the Patron should be without Remedy.

Doct. And if he were without Remedy, he should yet be in as good Case as he should be if the King should present: For if the Title should be given to the King, the Patron had lost his Presentment clearly for the Time, though the Church abide still void. For I have heard say, that in such Presentments no Time after the Law of the Realm runneth unto the King.

Stud. That is true, but there the Presentment should be taken from him by Right and by the Law, and here it should be taken from him against the Law, and there as the Law could not help him; and that the Law will not suffer.

Doct. Yet methinketh alway that the Title of the Lapse in such Case is given by the Law of the Church, and not by the Temporal Law: And therefore it forceth but little what the Temporal Law will in it, as me seemeth.

Stud. In such Countries where the Pope hath Power to determine the Right of temporal Things, I think it is as thou sayest; but in this Realm it is not so. And the Right of Presentment is a temporal thing, and a temporal Inheritance: And therefore I think it belongeth to the King's Law to determine, and also to make Laws who shall present after six Months, as well as before, so that the Title of Examination of Ability or Nonability be not thereby taken from the Ordinary. And in like wise it is of Avoidance of Benefices,

Benefices, that is to say, then it shall be judged by the King's Laws when a Benefice shall be said void, and when not, and not by the Law of the Church: As when a Parson is made a Bishop, or accepteth another Benefice without a Licence, or resigneth, or is deprived; in these Cases the Common Law saith, that the Benefice is void, and so they should be, though a Law were made by the Church to the contrary. And so if the Pope should have any Title in this Case to present, it should be by the Law of the Realm. And I have not seen ne heard that the Law of the Realm hath given any Title to the Pope to determine any Temporal Thing that may be lawfully determined by the King's Court.

Doct. It seemeth by that Reason that thou hast made now, that thou preferrest the King's Authority in Presentments before the Pope's; and that methinketh should not stand with the Law of God, sith the Pope is the Vicar-general under God.

Stud. That I have said proveth not that for the highest Preferment in Presentments he is to have Authority to examine the Ability of the Parson that is presented, for if the Presentee be able, it sufficeth to the discharge of the Ordinary by whomsoever he be presented, and that Authority is not denied by the Law of the Realm to belong alway to the Spiritual Jurisdiction. But my Meaning is, that as to the Right of Presentments, and to determine who ought to present, and who not, and at what Time, and when the Church shall

be judged to be void, and when not, belong to the King and to his Laws: Or else it were a Thing in vain for him to hold Plea of Advowsons, or to determine the Right of Patronage in his own Courts, and not to have Authority to determine the Right thereof, and those Claims seemeth not to be against the Law of God. And so me seemeth in this Case the Presentment is given the King.

Doct. And if the King should have Right to present then might the Church happen to continue void for ever: For as we have said before, no Time runneth to the King in such Presentment.

Stud. If any such Case happen, if the King present not, then may the Ordinary set in a Deputy to serve the Cure, as he may do when negligence is in other Patrons that may present, and do not; and also it cannot be thought that the King, which hath the Rule and Governance over the People, not only of their Bodies, but also of their Souls, will hurt his Conscience, and suffer a Benefice continually to stand without a Curate, no more than he doth in Advowsons that be of his own Presentment.

CHAP. XXXVII.

¶ Whether the Presentment and Collation of all Benefices and Dignities, voiding at *Rome*, belongeth only to the Pope.

In the same Sum called Summa Rosella in the Title Beneficium primum, in the 13 Article, it is said, that Benefices, Dignities and

and Parsonages voiding in the Court of Rome may not be given but by the Pope; and likewise of the Pope's Servants, and of other that come and go from the Court, if they die in Places nigh to the Court within two Days journey, all these belong to the Pope: But if the Pope present not within a Month, then after the Month they to whom it belongeth to present, may present by themselves only, or by their Vicars-general, if they be in far Parts. And these Sayings hold not in the Laws of the Realm.

Doct. What is the Cause that they hold not in this Realm as well as in all other Realms?

Stud. One Cause is this: The King in this Realm, according to the Ancient Right of his Crown, of all his Advowsons that be of his Patronage ought to present, and in like wise other Patrons of Benefices of their Presentment: And the Pleas of the Right of Presentments of Benefices within this Realm belong to the King and his Crown. And these Titles cannot be taken from the King and his Subjects but by their Assent; and the Law that is made therein to put away the Title bindeth not in this Realm. And over that, before the Statute of 25 Ed. 3. there was a great Inconvenience and Mischief by Reason of divers Provisions and Reservations that the Pope made to the Benefices in this Realm, contrary to the old Right of the King and other Patrons in this Realm as well to the Archbishopricks, Bishopricks, Deanries and Abbies, as to other Dignities and Benefices of the Church. And many Times Aliens thereby had Benefices

within the Realm that understood not the English Tongue, so that they could not counsel ne comfort the People when need required; and by that Occasion great Riches was conveyed out of the Realm. Wherefore, to avoid such Inconveniences, it was ordained by the said Statute, that all Patrons, as well Spiritual as Temporal, should have the Presentments freely: And in Case the Collation or Provision were made by the Pope in disturbance of any Spiritual Person, that then for that Time the King should have the Presentment; and if it were in Disturbance of any Lay Patron, that then if the Patron presented not within the Half-year after such Voidance, nor the Bishop of the Place within a Month after the Half-year, that then the King should have also the Presentment, and that the King should have the Profits of the Benefices so occupied by Provision, except Abbies and Priories, and other Houses that have College and Covent, and there the College and Covent to have the Profits. And because the Statute is general, and excepteth no such Benefices as shall void in the Court of Rome, or in such other Place as before appeareth, therefore they be taken to be within the Provision of the said Statute, as well as the Beneficesthat void within the Realm: And all Provisors and Executors of the said Collations and Provisions, and all their Attornies, Notaries and Maintainers, shall be out of the Protection of the King, and shall have like Punishment as they should have for executing of Benefices voiding within the Realm.

Doct. But I cannot see how the said Statute may stand with Conscience, that so far restrained the Pope of his Liberty, which, as me seemeth, he ought in this Case of Right to have.

Stud. Because (as I suppose) that Patrons ought of Right to have their Presentments under such Manner as they claim them in this Realm, as I have said before, and as in the 26 Chapter of this Book appeareth more at large. And also forasmuch as it appeareth evidently, that great Inconvenience followed upon the said Provisions, and that the said Statute was made to avoid the same, which sith that Time hath been suffered by the Pope, and hath been alway used in this Realm without Resistance, it seemeth that the said Statute should therefore stand with good Conscience.

CHAP. XXXVIII.

¶ If a House by Chance fall upon a Horse that is borrowed, who shall bear the Loss?

IN the said Sum, called Summa Rosella, the said Title Casus fortuitus, in the Beginning, is put this Case: If a Man lend another a Horse, which is called there a Depositum, and a House by chance falleth upon the Horse, whether in that Case he shall answer for the Horse? And it is answered there, that if the House were like to fail, that then it cannot be taken as a Chance, but as the Default of him that had

the Horse delivered to him: But if the House were strong, and of likelihood and by common Presumption in no Danger of falling, but that it fell by sudden Tempest, or such other Casualty, that then it shall be taken as a Chance, and he that had the keeping of the Horse shall be discharged. And though this Diversity agreeth with the Laws of the Realm, yet for the more plainer Declaration thereof, and for the more like Cases and Chances that may happen to Goods, that a Man hath in his keeping that be not his own, I shall add a little more thereto that shall be somewhat necessary, as methinketh, to the ordering of Conscience. First a Man may have of another by way of Loan or Borrowing Money, Corn, Wine, and such other Things, where the same Thing cannot be delivered if it be occupied, but another Thing of like Nature and like Value must be delivered for it; and such Things he that they be lent to, may by force of the Loan use as his own, and therefore if they perish, it is at his Jeopardy; and this is most properly called a Loan. Also a Man may lend to another a Horse, an Ox, a Cart, or such other Things as may be delivered again, and they by Force of that Loan may be used and occupied reasonably in such Manner as they were borrowed for, or as it was agreed at the Time of the Loan that they should be occupied: And if such Things be occupied otherwise then according to the Intent of the Loan, and in that Occupation they perish, in what wise soever they perish, so it be not in Default of the Owner, he that borrowed them shall be charged therewith in Law and Con-

Conscience: And if he that borrowed them occupy them in such Manner as they were lent for, and in that Occupation they perish in Default of him that they were lent to, then he shall answer for them; and if they perish not through his Default, then he that owneth them shall bear the Loss. Also if a Man have Goods to keep to a certain Day, for a certain Recompence for the keeping, he shall stand charged or not charged, after as Default or no Default shall be in him, as before appeareth: And so it is if he have nothing for the keeping. But if he have for the keeping, and make a Promise at the Time of the Delivery, to re-deliver them safe at his Peril, then he shall be charged with all Chances that may fall. But if he make that Promise, and have nothing for keeping, I think he is bound to no such Casualties, but that be wilful and his own Default, for that is a nude or a naked Promise, whereupon, as I suppose, no Action lieth. Also if a Man find Goods of another, if they be after hurt or lost by wilful Negligence, he shall be charged to the Owner: But if they be lost by other Casualty, as if they be laid in a House that by Chance is burned, or if he deliver them to another to keep, that runneth away with them, I think he be discharged. And these Diversities hold most commonly upon Pledges, or where a Man hireth Goods of his Neighbour to a certain Day for certain Money. And many other Diversities be in the Law of the Realm, what shall be to the Jeopardy of the one, and what of the other, which I will not speak of at this Time. And by this it may appear, that it is commonly

holden in the Laws of England, if a Common Carrier go by the Ways that be dangerous for robbing, or drive by Night, or in other inconvenient Time, and be robbed; or if he over-charge a Horse whereby he falleth into the Water, or otherwise, so that the Stuff is hurt or impaired; that he shall stand charged for his Misdemeanor: And if he would percase refuse to carry it, unless Promise were made unto him that he shall not be charged for no Misdemeanor that should be in him, the Promise were void; for it were against Reason and against good Manners, and so it is in all other Cases like. And all these Diversities be granted by secondary Conclusions derived upon the Law of Reason, without any Statute made in that Behalf. And peradventure Laws and the Conclusions therein be the more plain, and the more open. For if any Statute were made therein, I think verily more Doubts and Questions would arise upon the Statute, than doth now when they be only argued and judged after the Common Law.

CHAP. XXXIX.

¶ If a Priest have won much Goods by saying of Mass, whether he may give those Goods, or make a Will of them.

IN the said Sum, called Summa Rosella, in the Title Clericus quartus, the third Article, is asked this Question: If a Priest have won much Goods by saying of Mass, whether

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her he may give those Goods, or make a Will of them? Whereto it is answered there, that he may give them, or make a Will of them, specially when a Man bequeaths Money for to have Masses said for him. And the like Law is of such Things as a Clerk winneth by the Reason of an Office: For it is said there, that such Things come to him by Reason of his own Person. Which Sayings I think accord with the Law of the Realm. But forasmuch as the said Article, and in divers other Places of the said Chapter, and in divers other Chapters of the said Sum, is put great Diversity between such Goods as a Clerk hath by Reason of his Church, and such Goods as he hath by Reason of his Person; and that he must dispose such Goods as he hath by Reason of his Church in such Manner as is appointed by the Law of the Church, so that he may not dispose them so liberally as he may the Goods that come by Reason of his own Person: Therefore I shall a little touch what Spiritual Men may do with their Goods after the Law of the Realm.

First, a Bishop, of such Goods as he hath with the Dean and Chapter, he may neither make Gift nor Bequest; but of such Goods as he hath of his own by Reason of his Church, or of the Gift of his Ancestors, or of any other, or of his Patrimony, he may both make Gifts and Bequests lawfully. And an Abbot of the Goods of his Church may make a Gift, and that Gift is good as to the Law: But what it is in Conscience, that is after the Cause and Intent and Quality of the Gift.

For if it be so much that it notably hurteth the House or the Covent, or if he give away the Books or the Chalices, or such other Things as belong to the Service of God, he offendeth in Conscience; and yet he is not punishable in the Law, ne yet by Subpœna, after some Men, ne in none other wise but by the Law of the Church, as a Master of the Goods of his Monastery. But nevertheless I will not fully hold that Opinion, as to that that belongeth necessarily to the Service of God, whether any Remedy lie against him or not, but remit it to the Judgment of other. And of a Dean and Chapter, and a Master and Brethren, of Goods that they have to themselves, and also of Goods that they have with the Chapter and Brethren the same Diversity holdeth, as appeareth before of a Bishop and the Dean and Chapter; except that in the Case of a Master and Brethren the Goods shall be ordered as shall be assigned by the Foundation. And moreover, of a Parson of a Church, Vicar, or Chauntry-Priest, or such other, all such Goods as they have, as well such as they have by Reason of the Parsonage, Vicarage, or Chauntry, as that they have by Reason of their own Person, they may lawfully give and bequeath where they will after the Common Law; And if they dispose Part among the Parishioners, and Part to the building of Churches, or give Part to the Ordinary, or to poor Men, or in such other Manner, as it is appointed by the Law of the Church, they offend not therein, unless they think themselve bounden thereto by Duty, and by Authority of the Law of the Church, not regarding the King's

Laws;

Laws; for if they do so, it seemeth they resist the Ordinance of God, which hath given Power to Princes to make Laws. But there, as the Pope hath Sovereignty in Temporal Things as he hath in Spritual Things, there some say that the Goods of Priests must in Conscience be disposed as is contained in the said Sum. But that holdeth not in this Realm: For the Goods of Spiritual Men be Temporal in what Manner soever they come to them, and must be ordered after the Temporal Law, as the Goods of the Temporal Men must be. Howbeit, if there were a Statute made in this Case of like Effect in many Points as the Law of the Church is, I think it were a right good and a profitable Statute.

CHAP. XL.

¶ Who shall succeed a Clerk that dieth Intestate?

IN the said Sum, called Rosella, in the Chapter Clericus quartus, the 7 Article, is asked this Question, Who shall succeed to a Clerk that dieth Intestate? And it is answered, That in Goods gotten by Reason of the Church the Church shall succeed; but in other Goods his Kinsmen shall succeed after the Order of the Law, and if there be no Kinsman, then the Church shall succeed. And it is said farther, That Goods gotten by a Canon Secular by Reason of his Church or Prebend shall not go to his Successor in the Prebend, but to the Chapter. But where one that is beneficed is not

of the Congregation, but he hath a Benefice clearly separate, as if he be a Parson of a Parish-Church, or is a President, or an Archdeacon not beneficed by the Chapter, then the Goods gotten by Reason of his Benefice shall go to his Successor, and not to the Chapter. And none of these Sayings hold Place in the Laws of England.

Doct. What is then the Law, if a Parson of a Church or a Vicar in the Country die Intestate, or if a Canon Secular be also a Parson, and have Goods by Reason thereof, and also by a Prebend that he hath in a Cathedral Church, and he die Intestate, who shall have his Goods?

Stud. At the Common Law the Ordinary in all these Cases may administer the Goods, and after he must commit Administration to the next faithful Friends of him that is dead Intestate that will desire it, as he is bound to do where Lay-men that have Goods die Intestate. And if no Man desire to have Administration, then the Ordinary may administer, and see the Debts payed; and he must beware that he pay the Debts in such Order as is appointed in the Common Law: For if he pay Debts upon simple Contracts before an Obligation, he shall be compelled to pay the Debt upon the Obligation of his own Goods, if there be not Goods sufficient of him that died Intestate. And though it be suffered in such Case that the Ordinary may pay pound and pound-like, that is, to apportion the Goods among the Debtors after his Discretion, yet by the rigor of the Common Law he might be charged to him that can first have his Judgment against him. And furthermore,

more, by that is said before in the last Chapter it appeareth, that if a Bishop that hath Goods of his Patrimony, or a Master of a College, or a Dean, of Goods that they have of their own only to themselves, die intestate, that the Ordinary shall commit Administration thereof, as before appeareth; and if they make Executors, then the Executors shall have the Ministration thereof. But the Heirs nor the Kinsmen, by that Reason only that they be Heirs or of Kin to him that is deceased, shall have no medling with his Goods, except it be by Custom of some Countries, where the Heirs shall have their Lons, or where the Children (the Debts and Legacies paid) shall have a reasonable Part of the Goods, after the Custom of the Country.

CHAP. XLI.

¶ If a Man be outlawed of Felony, or be attainted for Murther or Felony, or that is an *Ascismus*, may be slain by every Stranger.

Doct. IT appeareth in the said Sum, called Summa Angelica, in the 21 Chap. in the Title of Ascismus, the second Paragraph, that he is an Ascismus that will slay Men for Money at the Instance of every Man that will move him to it; and such a Man may lawfully be slain not only by the Judge, but by every private Person. But it is said there in the 4 Paragraph, that he must first be judged by the

the Law as an Ascismus, ere he may be slain, or his Goods seised. And it is said farther there in the 2 Paragraph, that also in Conscience such an Ascismus may be slain, if it be done through a Zeal of Justice, and else not. Is not the Law of the Realm likewise of Men outlawed, abjured, or judged for Felony?

Stud. In the Law of the Realm, there is no such Law, that a Man shall be judged as an Ascismus; ne if a Man be in full Purpose, for a certain Sum of Money that he hath received, to slay a Man, yet it is no Felony ne Murther in the Law till he hath done the Act: For Intent of Felony nor Murther is not punishable by the Common Law of the Realm, though it be deadly Sin before God; but in Treason, or in some other particular Cases, by Statute that Intent may be punished. And though a Man in such Case kill a Man for Money, yet he shall not be attainted that he is an Ascismus; for, as it is said before, there is no such Term of Ascismus in the Law of the Realm: But he shall in such Case be arraigned upon the Murther, and if he confess it, or plead that he is not guilty, and is found guilty by 12 Men, he shall have Judgment of Life, and of Member, and shall forfeit his Lands and Goods. And like Law is of an Appeal brought of the Murther; if he stand dumb and will not answer to the Murther, he shall be attainted of the Murther, and shall forfeit Life, Lands and Goods. But if he be arraigned of the Murther upon an Indictment at the King's Suit, and thereupon standeth dumb, and will not answer;

answer; there he shall not be attainted of the Murther, but he shall have paine fort and dure, that is to say, he shall be pressed to Death, and he shall there forfeit his Goods and not his Lands. But in none of these Cases, that is to say, though a Man be outlawed for Murther or Felony, or be abjured, or that he be otherwise attainted; yet it is not lawful for any Man to murther him, or slay him, ne to put him in Execution, but by Authority of the King's Laws. Insomuch that if a Man be adjudged to have paine fort and dure, and the Officer beheadeth him, or on the contrary wise putteth him to paine fort and dure, where he should behead him, he offendeth the Law. And if an Officer which hath Authority to put a Man to Death may not put him to Death but according to the Judgment, then methinketh it should follow that, more stronger, a Stranger may not put such a Man to Death of his own Authority without Commandment of the Law. But if the Judgment be that he shall be hanged in Chains, and the Officer hangeth him in other things, and not in Chains, I suppose he is not guilty of his Death. But some say he shall there make a Fine to the King, because he hath not followed the Words of the Judgment.

Also if a Man that is no Officer would arrest a Man that is outlawed, abjured, or attainted of Murther or Felony, as is aforesaid, and he disobeyeth the Arrest, and by Reason of the Disobedience he is slain; I suppose the other shall not be impeached for his Death; for it is lawful unto every Man to take such Persons, and

and to bring them forth that they may be ordered according to the Law. But if a Capias be directed unto the Sheriff to take a Man in an Action of Debt or Trespass, there no Man may take the Man, but he have Authority from the Sheriff: And if any Man attempt of his own Authority to take him, and he resisteth, and in the resisting is slain, he that would have taken him is guilty of his Death.

CHAP. XLI

¶ Whether a Man shall be bounden by the Act or Offence of his Servant or Officer.

IN the said Sum, called Summa Angelica, in the Title Dominus, 4 Paragraph, is asked this Question. Whether a Man shall be charged for his Houshold? And it is said there, that he shall when the Houshold offendeth in an Office or Ministry that the Master is the chief Officer of, and he hath the Work and the Profit of the Houshold: For it shall be his Default that he would chuse such Servants, for he ought to appoint honest Persons. But it is said there, that it is to be understood civilly, and not criminally, whereby, as it is said there, he that is a Governour is bound for the Offence of his Officers; and that the same is to be holden of a Captain, that he shall be bound for the Offence of his Squires, and an Host for his Guest, and such other. Nevertheless it is said there, that certain Doctors, there rehearsed, said thereto, that if the Office be an open

or

or publick Office, as an Office of Power, or other like, it sufficeth to bring forth him that offended: But it is otherwise if it be not a publick Office, but an Host or a Taverner, or other like. But if the Houshold offend not in the Office, the Lord is not bound as to the Law, but in Conscience he is bound if he were in Default by not correcting them; for he is bound to correct them both by Word and Example, and if he find any incorrigible, he is bound to put him away, except that he hath Presumptions, that if he do so, he will be the worse, and then he may do that he thinketh best, and he is excused, and else not: For to such Persons it is said, *Error qui non resistitur, approbatur*, that is to say, an Error that is not resisted is approved. And though divers of the Sayings before rehearsed agree with the Law of the Realm, yet all do not so; and also they that do are to be observed by Authority of the Law of the Realm, and not by the Authority alledged in the said Paragraph. And therefore I intend to treat somewhat where the Master shall be charged by his Servant or Deputy, or by them that be under him in any Office, and where not: And then I intend to touch some other things, where the Master after the Laws of the Realm shall be charged by the Act of his Servant in other Cases not concerning Offices, and where not.

First, If a Man be committed to Ward upon Arrearages of Accompt, and the Keeper of the Prison suffereth him to go at large, then an Action of Debt shall lie against him. And if he be not sufficient, then it lieth against him that

that committed the keeping of the Prison unto him; and that is by Reason of the Statute of Westminster 2. cap. 11. Also if Bailiffs of Franchises that have Return of Writs make a false Return, the Party shall have Averment against it, as well of too little Issues as of other things, as well as he shall have against the Sheriff; but all the Punishment shall be only upon the Bailiff, and not upon the Lord of the Franchise: And that doth appear by the Statute made in the first Year of Edw. the 3. the 1. Chapter. But if an Under-Sheriff make a Return whereupon the Sheriff shall be amerced, there the High-Sheriff shall be amerced, for the Return is made expressly in his Name. But if it be a false Return whereupon an Action of Disceit lieth, in that Case it may be brought against the Under-Sheriff. And see thereof the Statute that is called Statutum de male returnantibus Brevis.

Also if the King's Butler make Deputies, he shall answer for his Deputies as for himself; as appeareth in the Statute made in the 21 Year of King Edw. the 3. De Proditionibus, the 21 Chapter.

Also in the Statute that is called Statutum Scaccarii, it is enacted, among other things, That no Officer of the Exchequer shall put any Clerk under him, but such as he will answer for. And forasmuch as the Statute is general, it seemeth that he shall answer as well for an Untruth in any such Clerk as for an Overfight.

Also

Also in the 14 Year of King Edw. the 3. c. 9. it is enacted, That all Gaols shall be adjoined again to the Shires, and that the Sheriff shall have the keeping of them, and that the Sheriff shall make such Under-gardeins for the which they will answer. And nevertheless I suppose that if there be an Escape by Default of the Gaoler, that the King may charge the Gaoler, if he will. But it is no doubt but he may charge the Sheriff, by Reason of this Statute, if he will. But if it be a wilful Escape in the Gaoler, which is Felony in him, the Sheriff shall not be bound to answer to the Felony, ne none other but the Gaoler himself, and they that assented to him.

Also if a Man have a Sheriffwick, Constableship, or Bailywick in Fee, whereby he hath the keeping of Prisoners, if he let any to Replevin that be not replevishable, and thereof be attaint, he shall leese the Office, &c. And if it be an Under-Sheriff, Constable or Bailiff, that hath the keeping of the Prison, that doth it without Knowledge of the Lord, he shall have Imprisonment by three Years, and after shall be ransomed at the King's Will; as appeareth in the Statute of West. 1. the 15 Chapter. And so it appeareth, that in this Case, he that is Lord of the Prison is not bound to answer for the Offence of them that have the Rule of the Prison under him, but that they shall have the Punishment themselves for their Misdemeanor. Also there is a Statute made in the 27 Year of King Edw. 3. the 19 Chapter, that is called the Statute of the Staple, whereby it is ordained, That no Merchant, ne none other Man, shall not leese their Goods for the Trespass or Forfeit of their Servants; unless

less it be by Commandment of his Master, or that he offend in the Office that his Master hath put him in, or else that the Master shall be bound to answer for the Deed of his Servant by the Law-merchant, as in some Places it is used.

Also it is enacted in the 14 Year of King Edw. the 3d the 8 Chapter, that Wapentakes and Hundreds that be severed from the Counties shall be adjoined again unto them, and that if the Sheriff hold them in his own Hands, that he shall put in them such Bailiffs that have Lands sufficient, and those for which he will answer; and that if he let them to Ferm, that they be let to the ancient Ferm: But after it is prohibited by the Statute of the 23 Year of King H. the 6th. the 10 Chapter, that no Sheriff shall let his Bailiwicks nor Wapentakes to Ferm. And when they be once in the Sheriff's own Hands, and the Sheriff put in Bailiffs, they be but as Under-Bailiffs to the King, and the Sheriff the High Bailiff, and they in manner the Sheriff's Servants, and put in only by him; and therefore by the said Statute of King Edw. the 3d he shall answer for them, if they offend in their Office. But if the Sheriff let them to Ferm, then though the Sheriff offend the Statute in that doing, yet whether he shall be charged for their Misdemeanor in the Office or not, is a great doubt to some Men; for they say that this Statute is only to be understood where the Bailiwicks be in the Sheriff's Hands, but here they be not so, ne the Bailiffs be not his Servants, but his Fermors: And therefore they say, That if the Sheriff shall be charged for them, it

it is by the Common Law, and not by the Statute aforesaid. Also in the second Year of King Henry the sixth the 14 Chapter it is enacted, That Officers by Patent in every Court of the King, that by Vertue of their Office have Power to make Clerks in the said Courts, shall be charged and sworn to make such Clerks under them for whom they will answer. Also the Hospitallers and Templars be prohibit they shall hold no Plea that belongs to the King's Courts, upon Pain to yield Damages to the Party grieved, and to make Ransom to the King: That the Superiors shall answer for their Obedienciers, as for their own Deed. Westm. 2. cap. 43. Also the Serjeant of the Catery shall satisfie all the Debts, Damages, and Executions that shall be recovered against any that is Purveior or Achator under him, that offend against the Statute of xxxvi of Edw. the iii. or against the Statute of xxiv of Henry the vi. in Case the Purveior or Achator be not sufficient, &c. And the Party Plaintiff shall have a Scire facias against the said Serjeant in this Case to have Execution, as appeareth in the 24 Year of King Henry the vi. the 1 Chapter.

Also if a Man be sent to Prison upon a Statute-merchant by the Mayor before whom the Recognisance was taken, and the Gaolor will not receive him, he shall answer for the Debt, if he have wherewith; and if not, then he shall answer that committed the Gaol to him, as appeareth in the Statute called the Statute-merchant.

And if outragious Toll be taken in the Town-merchant, if it be the King's Town let to Farm, the King shall take the Franchise of the Market into his Hands: And if it be done by the Lord of the Town the King shall do in like wise: And if it be done by the Bailiff, unknowing to the Lord, he shall yield again as much as he hath taken, and shall have Imprisonment of 40 Days. And so it appeareth that the Lord in this Case shall not answer for his Bailiff. West. 1, cap. 30. And in all the Cases before rehearsed, where the Superior is charged by the Default of him that is under him, he in whose Default his Superior is so charged, is bound in Conscience to restore him that is so charged through his Default: Except the Case before rehearsed of the Hospitallers, for all that the Obediencer hath is the Superior's if he will take it. And therefore what Recompence shall be made by the Obediencer in that Case, is at the Will of the Superior. And now I intend to shew thee some particular Cases, where the Master after the Laws of the Realm shall be charged by the Act of his Servant, Bailiff, or Deputy, and where not; and so for to make an End of this Chapter.

First, For Trespass of Battery, or wrongful Entry into Lands or Tenements, ne yet for Felony or Murther, the Master shall not be charged for his Servant, unless he did it by his Commandment.

Also if a Servant borrow Money in his Master's Name, the Master shall not be charged with it unless it come to his Use, and that by his Assent. And the same Law is, if a Servant make a Contract in his Master's Name, the Contract

tract shall not bind his Master, unless it were by his Master's Commandment, or that it came to the Master's Use by his Assent. But if a Man sends his Servant to a Fair or Market to buy for him certain things, though he command him not to buy them of no Man in certain, and the Servant doth according, the Master shall be charged: But if the Servant in that Case buy them in his own Name, not speaking of his Master, the Master shall not be charged, unless the things bought come to his Use.

Also if a Man send his Servant to the Market with a thing which he knoweth to be defective, to be sold to a certain Man, and he selleth it to him, there an Action lieth against the Master: But if the Master biddeth him not sell it to any Person in certain, but generally to whom he can, and he selleth it according, there lieth no Action of Deceit against the Master.

Also if the Servant keep the Master's Fire negligently, whereby his Master's House is burnt, and his Neighbour's also, there an Action lieth against the Master. But if the Servant bear Fire negligently in the Street, and thereby the House of another is burned, there lieth no Action against the Master.

Also if a Man desire to lodge with one that is no common Hostler, and one that is Servant to him that he lodgeth with robbeth his Chamber, his Master shall not be charged for the Robbing: But if he had been a common Hostler he should have been charged.

Also

And if a Man be Gardein of a Prison where-in is a Man that is condemned in a certain Sum of Money, and another that is in Prison for Felony, and a Servant of the Gardein that hath the Rule of the Prison under him, wilfully letteth them both escape; in this Case the Gardein shall answer for the Debt, and shall pay a Fine for the Escape of the other, as for a negligent Escape, and the Servant only shall be put to answer to the Felony for the wilful Escape.

Also if a Man make another his general Receiver, and that Receiver receiveth Money of a Creditor of his Master, and maketh him Acquittance, and after payeth not his Master; yet that Payment dischargeth the Creditor: But if the Creditor had taken an Acquittance of him without paying him his Money, that Acquittance only were no Bar to the Master, unless he made him Receiver by Writing, and gave him Authority to make Acquittances, and then the Authority must be shewed. And if the Creditor in such Case, by Agreement between the Receiver and him, delivered to the Receiver an Horse or another thing in Recompence of the Debt, that Delivery dischargeth not the Creditor, unless it be delivered over unto the Master, and he agree to it. For the Receiver hath no such Power to make no such Commutation, but his Master give him special Commandment thereto.

Also if a Servant shew a Creditor of his Master, that his Master sent him for his Money, and he payeth it unto him; that Payment dischargeth him not, if the Master did not send him

him for it indeed, except that it came after unto the Use of the Master by his Assent.

Also if a Man make a Bailiff of a Manor, and after the Lord of whom the Manor is holden grant the Seigniory to another, and the Bailiff after payeth the Rent to the Grantee; that Payment of the Rent countervaileth no Attornment though it were by Fine, ne shall not bind his Master, till he attorn himself: But if the Lord of whom the Land is holden disseised one of the Seigniory, and the Bailiff payeth the Rent to the Heir of the Lord, that is a good Seisin to the Heir, though the Bailiff had no Commandment of his Master to pay it: For it belongeth to his Office to pay Rent-service, but not Rent-charge, as some Men say.

Also an Encroachment by the Bailiff shall not bind the Master in Avowry, if he had no Commandment of the Master to pay it. Also if there be Lord, Mesne and Tenant, and the Tenant holdeth of the Mesne as of his Manor of D. the Mesne maketh a Bailiff, and after the Tenant maketh a Feoffment, the Feoffee tendreth Notice to the Bailiff and he accepteth his Rent with Arrearages; this Notice shall not bind the Lord, ne compel him to alter his Avowry: For the Office of a Bailiff stretcheth not thereto, but he must have therein a special Commandment of his Master. Also if a Servant ride upon his Master's Horse to do an Errand for his Master, into a Town that hath Authority to make Attachments of Goods upon Plaints of Debt, &c. and there, upon a Plaint of Debt made against the Servant, the

Master's Horse is attached by the Officers, thinking that the Horse were his own, and, because the Servant appeareth not, the Officers seise the Horse as forfeit; in this Case the Lord shall have an Action of Trespass against the Officers, and this Attachment for the Debt of his Servant shall not bind him, &c. But that an Host or Keeper of a Tavern shall be charged for their Guests, unless it be done by their Assent and Commandment, I do not remember that I have read it in the Laws of England.

CHAP. XLIII.

¶ Whether a Villain or a Bondman may give away his Goods.

Doct. IT appeareth in the said Sum, called Summa Angelica, in the Title Donatio prima, the 9 Paragraph, that a Bondman, or a Religious Man, a Monk, ne such other that hath nothing in proper, may not give, but it be by Licence of their Superior: But that saying is not, as it is said there, to be understood of Religious Persons that have lawful Ministration of Goods; for if they give with a Cause reasonable, it is good, but without Cause they may not.

Also if they by the Licence of the Prelate, with the Counsel of the more Part of the Covent, abide at School or go on Pilgrimage, they may give as other honest Scholars and Pilgrims be reasonably wont to do: And they may also give Alms where there is great need, if they have no Time to ask Licence.

Also

Also if they see one in extreme Necessity, they may give Alms though their Superiors prohibit them, for then all Things be in Common by the Law of God. And therefore they be bound for to do it, as appeareth in the aforesaid Sum, called Summa Angelica in the Title Eleemosyna, the 6 Paragraph. Doth not the Law of England agree with these Diversities?

Stud. Forasmuch as the Question is only made, Whether a Villain or a Bondman may give away his Goods or not? And it seemeth that after the aforesaid Sum in the Title which thou hast before rehearsed, that he, ne none other that hath no Property may not give; whereby it appeareth that the said Sum taketh it, that a Bondman should have no Property in his Goods, and that therefore his Gift should be void; I shall somewhat touch what Property and what Authority a Villain hath in his Goods after the Law of the Realm, and what Authority the Lord hath over them. And I will leave the Diversities that thou hast remembred before of Religious Persons to them that list to treat farther therein hereafter.

First, If a Villain have Goods, either by his own proper Buying and Selling, or otherwise by the Gift of other Men, he hath as perfect a Property, and also as whole Interest in them, and may as lawfully give them away, as any Freeman may. But if the Lord seise them before his Gift, then they be the Lord's, and the Interest of the Villain therein is determined.

Also if the Lord seise Part of the Goods of his Villain in the Name of all the Goods that the Villain hath or shall hereafter have; that Seisure is good for all the Goods that he had at the Time of the Seisure. But if Goods come to the Villain after the Seisure, he may lawfully give them away, notwithstanding the said Seisure.

Also if the Lord claim all the Goods of the Villain, and seiseth Part of them; that Seisure is void, and the Gift of the Villain is good, notwithstanding that Seisure.

Also if a Man be bound to a Villain in an Obligation in a certain Sum of Money, and the Lord seiseth the Obligation; then the Obligation is his, but yet he can take no Action thereupon but in the Name of the Villain: And therefore if the Villain release the Debt, the Lord is barred by that Release.

Also if a Woman be a Nief, and she marrieth a Freeman, the Goods immediately by the Marriage be the Husband's, and the Lord shall come too late to make any Seisure. And if the Husband in that Case maketh his Wife his Executrix, and dieth, and the Wife taketh the same Goods again as Executrix to her Husband; yet it shall not be lawful for the Lord to take them from her, though she be a Nief as she was before the Marriage.

Also if Goods be given to a Man to the Use of a Villain, and the Lord seiseth those Goods, the Seisure, after some Men, is good by the Statute made in the 19 Year of King H. 7. whereby it is enacted, That the Lord shall enter into Lands whereof other Persons be seised to the Use of his Villain;

Villain: And they say that the same Statute shall be understood by Equity of Goods in Use, as well as of Lands in Use.

Also if a Villain be made a Priest, yet nevertheless the Lord may seise his Goods and Lands, as he might do before; And until the Seisure, he may alien them and give them away, and as he might before he was a Priest. And in this Case the Lord may order him, so that he shall do him such Service as belongeth to a Priest to do, before any other: But he may not put him to no Labour nor other Business but that is honest and lawful for a Priest to do.

Also if a Villain enter into Religion, in his Year of Proof he may dispose his Goods as he might have done before he took the Habit upon him.

Also in like wise the Lord may seise his Goods as he might have done before: But if he after make Executors, and be professed, and the Executors take the Goods to the Performance of the Will; then the Lord may not seise the Goods though the Executors have them to the Performance of the Will of him that is his Villain; nor in that Case the Lord may not seise his Body, ne put him to no manner of Labour, but must suffer him to abide in his Religion under the Obedience of his Superior, as other Religious Persons do that be not Bondmen. And the Lord hath no Remedy in that Case for the Loss of his Bondman, but only to take an Action of Trespass against him that received him in to Religion without his Licence, and thereupon to recover Damages as shall be assessed by xii Men. Many other Cases there-

there be concerning the Gift of the Goods of a Villain, whereof I shall speak no more at this Time; for this that I have said sufficeth to shew, that the Knowledge of the King's Law is right expedient to the good Order of Conscience concerning such Goods.

CHAP. XLIV.

¶ If a Clerk be promoted to the Title of his Patrimony, and after selleth his Patrimony, and after falleth to Poverty, whether shall he have his Title therein, or not?

IN the said Sum, called Rosella, in the Title Clericus quartus, the 24 Article, it is asked, If a Clerk be promoted to the Title of his Patrimony, whether he may alien it at his Pleasure; and whether in that Alienation the solemnity needeth to be kept, that is to be kept in Alienations of Things of the Church? And it is answered there, that it may not be aliened no more than the Goods of a Spiritual Benefice, if it be accepted for a Title, and expresly assigned unto him, so that it should go as into a Thing of the Church, except he have after another Benefice whereof he may live. But if it be secretly assigned to his Title, some agree it may be aliened. And in this Case, by the Laws of the Realm, it may be lawfully aliened, whether it be secretly or openly assigned to the Title; for the Ordinary, ne yet the Party himself, after the old Custom of the Realm, have no Authority to bind any Inheritance by Authority of

of the Spiritual Law: And therefore the Land, after it is assigned and accepted to be his Title, standeth in the self-same Case to be bought, sold, charged, or put in Execution, as it did before. And therefore it is somewhat to be marvelled, that Ordinaries will admit such Land for a Title, to the Intent that he that is promoted should not fall into extream Poverty, or go openly a begging, without knowing how the Common Law will serve therein: For of meer Right all Inheritances within this Realm ought to be ordered by the King's Laws, and Inheritance cannot be bound in this Realm but by Fine, or some other Matter of Record, or by Feoffment, or such other, or, at least by a Bargain that changeth an Use. And over that to assign a State for Term of Life to him that hath a Fee-simple before, is void in the Laws of England, without it be by such a Matter that it work by way of Conclusion or Estoppel; and in this Case is no such Matter of Conclusion: and therefore all that is done in such Case in assigning of the said Title is void. Also there is no Interest that a Man hath in any Manor, Lands or Tenements for Term of Life, for Term of Years, or otherwise, but that he by the Law of the Realm may put away his Right therein if he will. And then when this Man alieneth his Land generally, it were against the Law of the Realm that any Interest of such a Title should remain in him against his own Sale: And there is no Diversity, whether the Assignment of the Title were open or Secret, and so the Title is void to all Intents. And in like wise, if a House of Religion, or any

any other Spiritual Man that hath granted a Title after the Custom used in such Titles, sell all the Lands and Goods that they have, that Sale in the Laws of England, is good as against the Title, and the Buyer shall never be put to answer to the Title. Also some say, that upon the common Titles that be made daily in such Case, that if he fall to Poverty that hath the Title, he is without Remedy: For they be so made, that at the Common Law there is no Remedy for them; and if he take a Suit in the Spiritual Court, many Men say that a Prohibition or a Præmunire lieth. And therefore it were good for Ordinaries in such Case to counsel with them that be learned in the Law of the Realm, to have such a Form devised for making of such Titles, that if need be, would serve them that they be made unto; or else let them be promoted without any Title, and to trust in God, that if they serve him as they ought to do, he will provide for them to have sufficient for them to live upon. And beside these Cases that I have remembred before, there be many other Cases put in the said Sums for well-ordering of Conscience, that, as methinketh, are not to be observed in this Realm, neither in Law nor Conscience.

Doct. Dost thou then think that there was Default in them that drew the said Sums, and put therein such Cases and such Solutions that, as thou thinkest, hurt Conscience, rather than to give any Light to it, specially in this Realm?

Stud. I think no Default in them, but I think that they were right well and charitably occupied, to take so great Pain and Labour as they did therein, for the Wealth of the People, and clearing of their Conscience: For they have thereby given a right great Light in Conscience to all Countries where the Law Civil and the Law Canon be used to temporal Things. But as for the Laws of this Realm they know them not, ne they were not bound to know them: And if they had known them, it would little have holpen them for the Countries that they most specially made their Treatises for. And in this Country also they be right necessary and much profitable to all Men, for such Doubts as rise in Conscience in divers other Manners not concerning the Laws of the Realm. And I marvel greatly, that none of them that in this Realm are most bounden to do that in them is to keep the People in a right Judgment, and in a clearness of Conscience, have done no more in Time passed to have the Law of the Realm known than they have done: For though Ignorance may sometimes excuse, yet the Knowledge of the Truth and the true Judgment is much better; and sometime though Ignorance excuseth in part, it excuseth not in all: And therefore methinketh they did very well if they would yet be Callers on to have that Point reformed as shortly as they could. And now because thou hast now satisfied my Mind in many of these Questions that I have made, I purpose for this Time to make an end.

Doct. I pray thee yet shew me, or that thou make an End, more of these Cases, that after thine Opinion be set in divers Books of Learn-

ing of Conscience, that, as thou thinkest, for lack of Knowledge of the Law of the Realm, do rather blind Conscience, than give a Light unto it: For if it be so, then, surely, as thou hast said, it would be reformed. For I think verily, the Laws of the Realm in many Cases must in this Realm be observed as well in Conscience, as in the Judicial Courts of the Realm.

Stud. I will with good-will shew to thee shortly some other Questions that be made in the said Sum, to give thee another occasion to see therein the Opinions of the said Sums, and to see farther thereupon how the Opinions and the Laws of the Realm do agree together. And yet besides these Questions that I intend to shew unto thee, there be many other Questions of the said Sums that had as great Need to be more plainly declared according to the Laws of the Realm, as those that I shall shew thee hereafter, or as I have spoken of before. But to the Cases that I shall speak of hereafter I will shew thee nothing of my Conceipt in them, but shall leave it to others that will of Charity take some farther Pain hereafter in that Behalf.

CHAP.

CHAP. XLV.

¶ Divers Questions taken by the Student out of the Sums, called *Summa Rosella* and *Summa Angelica*, which he thinketh necessary to be looked upon, and to be seen how they stand and agree with the Law of the Realm.

THE first Question is this, Whether a Custom may break a Law positive? Summa Rosella, Titulo Consuetudo, Parag. 13.

The second is, If a Man attainted or banished be restored by the Prince, whether shall that Restitution stretch to the Goods? Summa Rosella, in the Title Damnatus, in principio.

Item, If a Man that is outlawed of Felony, abjured, or attainted of Murther or Felony, or he that is an Ascismus, may be slain by Strangers? And see the like Matter thereto, Summa Angelica, in the Title Ascismus, Parag. 11.

This Question is somewhat answered to in a new Addition, as appeareth before in the 14. Chapter.

Item, Whether the Master shall be bound by the Act or Offence of his Servant or Officer? Summa Angelica, in the Title Dominus, Par. 4.

This Question is answered to in an Addition, as appeareth before in the xiv Chapter.

Item, Whether a Villain may give away his Goods. Summa Angelica, in the Title Donatio prima, Parag. 9.

This

This Question is answered to in an Addition, as appeareth before in the 41 Chap.

Item, Whether an Abbot may give, &c. Summa Angelica, in the Title Donatio 1. Parag. 10 & 11.

Item, Whether a Woman-covert may give away any Goods? And it is answered, Summa Angelica, in the Title Donatio 1. Parag. 11. that she may not, without she have Goods beside her Dowry, but only in Alms.

Item, If a Man do Treason, whether the Gift of Goods after, before Attainder, be good? Summa Angelica, in the Title Donatio 1. Parag. 12. And it seemeth there may, and look Summa Angelica, in the Title Alienatio Par. 24.

Item, If a Man wittingly make a Contract between two Kinsfolk, or other that may not lawfully marry together, whether he hath forfeit his Goods? Summa Angelica in the Title Donatio 1. Parag. 14.

Item, Whether the Father may give to the Son? Summa Angelica, in the Title Donatio prima, Parag. 19. and Summa Rosella, in the Title Donatio 2. Parag. 42.

Item, Whether a Man may give above v. C. S. absq; inquisitione? Summa Angelica in the Title Donatio 1. Parag. 20.

Item, Whether a Gift shall be avoided by an Ingratitude? Summa Rosella, in the Title Donatio 1. Parag. 17 & 29. And there it is said, that the Gift is void by the Law of Nature: And look Summa Angelica, in the Title Donatio prima, Parag. 42 & 45.

Item, Whether any Gift between the Husband and the Wife may be good? And it is said

Yea,

Yea, when the Husband giveth it causa remunerationis. Summa Rosella, in the Title Donatio 1. Parag. 32.

Item, If a Man make a Will, and enter into Religion, whether he may after revoke the Will? And it is said, that Friers Minors may not, and others may. Summa Rosella, in the Title Donatio 1. Parag. 35. in fine.

Item, If a Man give another a Town with all the Rights that he hath in the same, whether the Patronage, &c. and the Tithes pass? Summa Rosella, in the Title Ecclesia 1. Parag. 56.

Item, Whether all that is bought with the Money of the Church be the Church's? Summa Rosella, in the Title Ecclesia 1. Parag. 7.

Item, If a Gift made to a Monastery may be avoided by that the Giver hath Children after the Gift? Summa Rosella, in the Title Donatio 1. Parag. 43.

Item, If a Man buy any thing under the half Price, whether he be bound by the Law to restore it? Summa Rosella, in the Title Emptio & Venditio. Parag. 6.

Item, Whether a common Thief, vel communis Depopulator agrorum, may abjure? Summa Rosella, in the Title Emunitas 2. in principio. Et habetur ibi in fine, quod licet Leges excipiant plures personas, tamen per Jus canonicum Legibus derogatum est.

Item, Whether a Man shall take the Church for great and enormous Offences that is not Murther nor Felony? Summa Rosella, in the Title Emunitas 2. Parag. 3. 11.

Item,

Item, If a Man take one in the Highway, and draw him out, and there beateth him, whether he shall have the Punishment, that is ordained for them that strike one in the Highway? Summa Rosella, in the Title Emunitas 2. Parag. 6.

Item, Whether he that taketh the Church, may, after the Offence, be adjudged to Death? Summa Rosella, in the Title Emunitas 2. Parag. 8.

Item, Whether the Bishop's Pall is by Sanctuary? Summa Rosella, in the Title Emunitas 2. Parag. 24.

Item, Whether the Dignity of the Bishop or Priesthood discharge Bondage? Summa Rosella, in the Title Episcopus, in Principio.

Item, Whether a Clerk is bound to pay any Impositions or Tallages for his Patrimony, or otherwise? Summa Rosella, in the Title Excommunication 1. divisione oct. Parag. 4, 5 & 6. & divisione nona, Parag. 1.

Item, If it were ordained by Statute, that if a Man sell, &c. he shall give to the King ii d. whether a Clerk be bound to give it, if he sell of his Prebend? Summa Rosella, in the Title Excommunication 1. divisione nona, Parag. 3.

Item, If it be ordained by Statute, that there shall not be laid upon a dead Person but such a certain Cloth, or thus many Tapers or Candles; whether the Statute be good? And it is left for a Question. Summa Rosella, in the Title Excommunicatio 1. divisione 18. Parag. 8. in fine.

Item, If a Man make a Lease of a Mill for Term of Years, and it is agreed that the Lessee shall grind the Lessor Toll-free during the Term, after the Lessor is made an Earl or a Duke, and

hath

hath greater Houshold than before; whether the Lessee be bound there, &c? Summa Rosella, in the Title Familia, Parag. 5.

Item, If a Master will not pay his Servant's Wages that hath served him faithfully, whether that Servant may take secretly as much Goods of the Master, &c. and if he do, whether he be bound to Restitution? Summa Rosella, in the Title Familia, Parag. 6.

Item, If Things immoveable of the Church may not be given? Summa Rosella, in the Title Feodum, Parag. 1. And see there in principio what Feodum is.

Item, Whether the Sons Bastards and the Sons lawfully begotten shall inherit together? Summa Rosella, in the Title Filius, Parag. 1.

Item, Whether Father and Mother may succeed to their Bastards? Summa Rosella, in the Title Filius, Parag. 4.

Item, Whether the Father may leave any of his Goods to his Bastards? Summa Rosella, in the Title Filius, Parag. 5. And Summa Rosella, in the Title Societas, Parag. 23.

Item, Whether the Offence of the Father shall hurt the Son in temporal things? Summa Rosella, in the Title Filius.

Item, If a Man give all his Lands and Goods to his Children, whether a Bastard shall have any Part? Summa Rosella, in the Title Filius, Parag. 22.

Item, To whom Treasure found belongeth? Summa Rosella, in the Title Furtum, Parag. 11.

Item, If a Deer or other wild Beast that is so sore hurt that he may be taken, cometh into another Man's Ground, whether it be his that

that owneth the Ground, or his that strake him? Summa Rosella, in the Title Furtum, Parag. 13.

Item, Whether Theft be in a little thing as well as in a great thing? Summa Rosella, in the Title Furtum, Parag. 18.

Item, What Pain a Thief shall have? Summa Rosella, in the Title Furtum, Parag. 22.

Item, If the Goods of dead Men go to the Heirs, and that of damned Men? s. De terris. Summa Rosella, in the Title Hæreditas, Parag. 1.

Item, Whether a Man shall be said guilty of Murder by Commandment, Counsel, or Assent? Summa Rosella, in the Title Homicidium 2. per totum. And like Matter in Homicidium 4. in principio, and in divers other Cases.

Item, A Man maketh a privy Contract with a Woman, and after hath a Child by her, and after marrieth another Woman, and hath a Child, she not knowing the first Contract; which of the Children shall be his Heir? Summa Rosella, in the Title Illegitimus, Parag. 4.

Item, Whether the Pope may legitimate one to temporal things, and to succeed? Summa Rosella, in the Title Illegitimus.

Item, If Goods be found that were left of the Owner as forsaken, who hath Right to them? Summa Rosella, in the Title Inventa, Parag. 2. And look Summa Rosella, in the Title Furtum, Parag. 17.

And thus I make an End of these Questions: And because thou desirest me in the 13 Chapter to shew thee somewhat where Ignorance

rance excuseth in the Law of the Realm, and where not, I will answer somewhat to thy Question, and so commit thee to God.

CHAP. XLVI.

¶ Where Ignorance of the Law excuseth in the Laws of *England*, and where not.

IGnorance of the Law (though it be invincible) doth not excuse as to the Law but in few Cases; for every Man is bound at his Peril to take Knowledge what the Law of the Realm is, as well the Law made by Statute as the Common Law: But Ignorance of the Deed, which may be called the Ignorance of the Truth of the Deed, may excuse in many Cases.

Doct. I put case that a Statute penal be made, and it is enacted, That the Statute shall be proclaimed by such a Day in every Shire, and it is not proclaimed before the Day, and after the Day a Man offends against the Statute; shall he run in the Penalty?

Stud. I think yea, if there be no farther Words in the Statute to help him; that is to say, that if the Proclamation be not made, that no Man shall be bound by the Statute. And the Cause is this; There is no Statute made in this Realm but by the Assent of the Lords Spiritual and Temporal, and of all the Commons, that is to say, by the Knights of the Shire, Citizens and Burgesses, that be chosen by Assent of the Commons, which in the Parliament represent the Estate of the whole Com-

Commons: And every Statute there made is of as strong Effect in the Law, as if all the Commons were there present personally at the making thereof. And like as there needed no Proclamation, if all were there present in their own Person; so the Law presumeth there needeth no Proclamation when it is made by their Authority: And then when it is enacted, that it shall be proclaimed, &c. that is but of the Favour of the Makers of the Statute, and not of Necessity; and it cannot therefore be taken, that their Intent was that it should be void if it were not proclaimed. Nevertheless some be of Opinion, that if a Man before the Day appointed for the Proclamation offend the Statute, that he should not in that Case be punished; for they say that the Intent of the Makers of the Statute shall be taken to be, that none should be punished before the Day: Which is a Doubt to some other. But admit it to be as they say, that he shall be excused, yet he is not excused by the Ignorance of the Law, but because the Intent of the Makers excuseth him.

Doct. It is enacted in the 7 Year of R. 2. cap. 6. That every Sheriff shall proclaim the Statute of Winchester three Times every Year in every Market-town, to the Intent the Offenders shall not be excused by Ignorance: And it seemeth by these Words, That if no Proclamation be made, that the Offendor may be excused by Ignorance.

Stud. Some take the Intent of that Statute to be, That the People by that Proclamation should have Knowledge of the Statute of

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Winchester, to the Intent that the Forfeiture therein may be taken as well in Conscience as in Law; and some take the Statute to be of such Effect as thou speakest of, that is to say, that no Forfeiture should grow upon the Statute of Winchester against them that were Ignorant, but Proclamation were made according to the said Statute of Richard. And if it be so taken, the Statute of Winchester is of small Effect against most Part of the People; for certain it is that the said Proclamation is not made: But admit it be as they say, then they that be ignorant be excused by the said particular Estatute specially made in that Case, and not by the general Rules of the Law: And sometimes, in divers Statutes penal, they that be ignorant be excused by the same Statute, as it is upon the Statute of of Richard the 2 the 13 Year, the 2 Statute, and the last Chap. where it is enacted, That if any Person take a Benefice by Provision, that he shall be banished the Realm, and forfeit all his Goods, and that if he be in the Realm, he avoid within 6 Weeks after he hath accepted it, and that none shall receive him that is so banished after the said six Weeks, upon like Forfeiture if he have Knowledge: And so he that hath no Knowledge is excused by the express Words of the Statute. And in like wise he that offendeth against Mag. Cha. is not excommenged, but he have Knowledge that it is prohibit that he doth: For they be only excommenged by the Sentence called Sententia lata super Chartas, that do it wilingly, or that do it by Ignorance, and correct not themselves within 15 Days after they have

have Warning. And sometime they that be ignorant of a Statute be excused from the Penalty of the Statute, because it shall be taken that the Intent of the Makers of the Statute was, That none should be bound but they that have Knowledge: But that any Man shall be discharged in the Law by Ignorance of the Law, only for that he is ignorant, I know few Cases, except it might be applied to Infants that be in their Infancy, and within Years of Discretion; for if Ignorance of the Law should excuse in the Law, many Offenders would pretend Ignorance.

Doct. Shall an Infant that hath Discretion, and knoweth Good from Evil, be punished by a penal Statute that he is ignorant in?

Stud. If the Statute be, that for the Offence he should have corporal Pain, I think he shall be excused, and have no corporal Pain: But I suppose that that is not for the Ignorance; for though he knew the Statute, and willingly offended, yet I think he shall have no corporal Pain; as where he pleads Jointenancy by Deed that is found against him, or if he plead a Record in Assise, and faileth of it at his Day: But that is because the Law presumeth, That it was not the Intent of the Makers of the Statute that he should have that Punishment. But if he be of Years of Discretion to know Good from Evil, whether he shall then forfeit the Penalty of a penal Statute, it is more doubt: For it is commonly holden, That if an Infant had not been excepted in the Statute of Forejudgment, that the Forejudgment should have bound him, and so shall his Cesser, and

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his levying of a Cross against the Statute; or if he be Gardein of a Prison, and suffer a Prisoner to escape, he shall pay the Debt, because the Statutes be general: And if he should by the Statutes be bound within Age, like Reason will that he may by a Statute penal leese his Goods.

Doct. If an Infant do a Murther or Felony at such Years as he hath Discretion to know the Law, shall not he have the Punishment of the Law, as one of full Age?

Stud. I think yes; but that is by an old Maxime of the Law, for eschewing of Murthers and Felonies: And so it is of a Trespass. But these Cases run not upon the Ground of Ignorance, but with what Acts Infants shall be punishable or not punishable for the Tenderness of their Age, though they be not ignorant.

Doct. Be not yet Knights and Noblemen, that are bound most properly to set their Study to Acts of Chivalry, for Defence of the Realm, and Husbandmen, that must use Tillage and Husbandry for the Sustenance of the Commonalty, and that may not by Reason of their Labour put themselves to know the Law, discharged by Ignorance of the Law?

Stud. No verily: For sith all were Makers of the Statute, the Law presumeth that all have Knowledge of that that they make, as it is said before: And as they be bound at their Peril to take Knowledge of the Statute that they make, so be all them that come after them. And as for Knights and other Nobles of the Realm, me seemeth that they should be bound

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to take Knowledge of the Law as well as any other within the Realm, except them that give themselves to the Study and Exercise of the Law, and except spiritual Judges, that in many Cases be bound to take Knowledge of the Law of the Realm, as it is said before in Chap. 25. For though they be bound to Acts of Chivalry for Defence of the Realm, yet they be bound also to the Acts of Justice, and that (it seemeth) more than other be, by Reason of their great Possessions and Authority, and for the well-ordering of the Tenants, Servants and Neighbours, that many times have need of their Help; and also that they be oft called to be of the King's Counsel, and to the general Counsels of the Realm, where their Counsel is right expedient and necessary for the Commonwealth. And therefore if the Noblemen of this Realm would see their Children brought up in such Manner, that they should have Learning and Knowledge more than they have commonly used to have in Time past, specially of the Grounds and Principles of the Law of the Realm, wherein they be inheerit (though they had not the high cunning of the whole Body of the Law, but after such Manner as Mr. Fortescue in his Book that he entituleth the Book, De Laudibus Legum Angliæ, advertiseth the Prince to have Knowledge of the Laws of the Realm) I suppose it would be a great Help hereafter to the Ministration of Justice of this Realm, a great Surety for himself, and a right great Gladness to all the People. For certain it is, the more Part of the People would more gladly hear that their Rulers and Governours intended to order them with

Wisdom and Justice, than with Power and great Retinues. But Ignorance of the Deed many times excuseth in the Laws of England: And I shall shortly touch some Cases thereof, to shew where it shall excuse, and where it shall not excuse; and then the Reader may add to it after his Pleasure, and as he shall think to be convenient.

CHAP. XLVII.

¶ Certain Cases and Grounds where Ignorance of the Deed excuseth in the Laws of *England*, and where not.

If a Man buy a Horse in open Market of him that in Right had no Property to him, not knowing but that he hath Right, he hath good Title and Right to the Horse, and the Ignorance shall excuse him. But if he had bought him out of the open Market, or if he had known that the Seller had no Right, the buying in open Market had not excused him. Also if a Man retain another Man's Servant, not knowing that he is retained with him, the Ignorance excuseth him both of the Offence that was at the Common Law against the Maxime that prohibited such retaining of another Man's Servant, and also against the Statute 33 Edward 3. whereby it is prohibit, upon Pain of Imprisonment, that none shall retain no Servant that departeth within his Term, without Licence or reasonable Cause: For it hath been alway taken, that the Intent of the Makers of the said Statute was, that they that were igno-

ignorant of the first Retainor should not run in any Penalty of the Statute. And the same Law is of him that retaineth one that is Ward to another, not knowing that he is his Ward. And if Homage be due, and the Tenant after that the Homage is due maketh a Feoffment, and after the Lord, not knowing of the Feoffment, distraineth for the Homage; in that Case that Ignorance shall excuse him of his Damages in a Replevin, though he cannot avow for the Homage. But if he had known of the Feoffment, he should have yielded Damages for the wrongful taking. Also if a Man be bound in an Obligation that he shall repair the Houses of him that he is bound to by such a certain Time, as oft as need shall require, and after the Houses have need to be repaired, but he that is bound knoweth it not; that Ignorance shall not excuse, for he hath bound himself to it, and so he must take Knowledge at his Peril. But if the Condition had been, that he should repair such Houses as he to whom he was bound should assign, and after he assigneth certain Houses to be repaired, but he that is bound hath no Knowledge of that Assignment; that Ignorance shall excuse him in the Law, for he hath not bound himself to no Reparation in certain, but to such as the Party will assign, and if he assign none, he is bound to none; and therefore sith he that should make the Assignment is privy to the Deed, he is bound to give Notice of his own Assignment: But if the Assignment had been appointed to a Stranger, then the Obligor must have taken Knowledge of the Assignment at his Peril. Also if a Man buy Lands whereunto

unto another hath Title, which the Buyer knoweth not, that Ignorance excuseth not him in the Law, no more than it doth of Goods. Also if a Servant come with his Master's Horse to a Town that by Custom may attach Goods for Debt, and upon a Plaint against the Servant an Officer of the Town by Information of the Party attacheth the Master's Horse, thinking that it were the Servant's Horse, that Ignorance excuseth him not; for when a Man will do an Act, as to enter into Land, seise Goods, take a Distress, or such other, he must by the Law at his Peril see that that he doth be lawfully done, as in the Case before rehearsed. And in like wise, if a Sheriff by a Replevin deliver other Beasts than were distrained, though that the Party that distrained, shew him they were the same Beasts, yet an Action of Trespass lieth against him, and Ignorance shall not excuse him: For he shall be compelled by the Law, as all Officers commonly be, to execute the King's Writ at his Peril according to the Tenor of it, and to see that the Act that he doth be lawfully done. But otherwise it is, after some Men, if upon Summons in a Præcipe quod reddat the Sheriff by Information of the Demandant summoneth the Tenant in another Man's Land, thinking it for the Tenant's Land; there they say he shall be excused: For in that Case he doth not seise the Land, ne take Possession in the Land, but only doth summon the Tenant upon the Land; and the Writ commandeth him not that he shall summon the Tenant upon his own Land, but generally that he shall summon him, and knoweth not in

what Land; and then by an old Maxime in the Law it is taken, that he shall summon him upon the Land in Demand: And therefore though he mistake the Land, and be ignorant of it, yet if the Demandant inform him that that is the Land that he demandeth, that sufficeth to the Sherif as to his Entry for the summoning, as they say, though it be not the Tenant's. And here I make an End of these Questions for this Time.

Doct. I pray thee yet or we depart take a little more Pain in my Desire.

Stud. What is that?

Doct. That thou wouldst shew me thy Mind in divers Cases of the Law of the Realm, which (as me seemeth) stand not so clearly with Conscience as they should do. And therefore I would gladly hear thy Conceit therein, how they may stand with Conscience.

Stud. Put the Cases, and I shall with goodwill say as I think to them.

CHAP. XLVIII.

¶ The first Question of the Doctor, How the Law of *England* may be said reasonable, that prohibiteth them that be arraigned upon an Indictment of Felony or Murther, to have Counsel.

Stud. Methinketh that the Law in that Point is very good and indifferent, taking the Law therein as it is.

Doct. Why? what is the Law in this Point?

Stud.

Stud. The Law is as thou sayest, that he shall have no Counsel: But then the Law is farther, that in all Things that pertain to the Order of Pleading the Judges shall so instruct him and order him, that he shall run into no Jeopardy by his Mispleading. As if he will plead that he never knew the Man that was slain, or that he never had a Penny-worth of the Goods that is supposed that he should steal; in these Cases the Judges are bound in Conscience to inform him that he must take the general Issue, and plead that he is Not guilty: For though they be set to be indifferent between the King and the Party as to the Party and to the principal Matter, as they be in all other Matters; yet they be in this Case to see that the Party take no Hurt in Form of Pleading in such Matters as he shall shew to be the Truth of the Matter. And that is a great favour of the Law. For in Appeal, though the Justices of favour will most commonly help forth the Party, and sometime his Counsel also, in the Form of Pleading, as they do also many Times in Common Pleas; yet they might in those Cases, if they would, bid the Party and his Counsel plead at their Peril. But they may not do so with Conscience upon Indictments, as me seemeth: For it were a great Unreasonableness in the Law, if it should prohibit him that standeth in Jeopardy of his Life, that he should have no Counsel, and to drive him to plead after the straight Rules and Formalities of the Law that he knoweth not.

Doct. But what if he be known for a Common Offender, or that the Judges know by Examination, or by an evident Presumption, that he is guilty, and he asketh Sanctuary, or pleadeth Misnosmer, or hath some Record to plead, that he cannot plead after the Form; may not the Judges in these Cases bid him plead at his Peril?

Stud. I suppose they may not: For though he be a Common Offender, or that he be guilty, yet he ought to have that the Law giveth him, and that he shall have the Effect of his Pleas, and of his Matters entred after the Form of the Law. And also sometime a Man by Examination and by Witness may appear guilty that is not; and in like wise there may be a vehement Suspicion that he is guilty, and yet he is not guilty: and therefore for such Suspicion or vehement Presumptions methinketh a Man may not with Conscience be put from that he ought to have by the Law, ne yet although the Judges knew it of their own Knowledge. But if it were in Appeal, I suppose that the Judges might do therein as they should think best to be done in Conscience: For there is no Law that bindeth them to instruct him, (but as they do commonly to the Parties of Favour in all other Cases) but they may, if thy will, bid him plead at his Peril, by Advice of his Counsel: And if the Appellee be Poor, and have no Counsel, tha Court must assign him Counsel, if he ask it, as they must do in all other Cases: And that methinketh they are bound to do in Conscience, though the Appellee were never so great an Offender, and though the Judges know

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knew never so certainly that he were guilty, for the Law bindeth them to do it. And so methinketh that there is great Diversity between an Indictment and an Appeal. And the Reason why the Law prohibiteth not Counsel in Appeal as it doth in an Indictment, I suppose is this: There is no Appeal brought, but that of Common Presumption the Appellant hath great Malice against the Appellee; as when the Appeal is brought by the Wife of the Death of her Husband, or by the Son of the Death of his Father, or that an Appeal of Robbery is brought for stealing of Goods. And therefore if the Judges should in those Cases shew themselves to instruct the Appellees, the Appellants would grutch and think them partial: And therefore as well for the Indemnity of the Court, as of the Appellee, in Case that he be not guilty, the Law suffereth the Appellee to have Counsel. But when that a Man is indicted at the King's Suit, the King intendeth nothing but Justice with favour, and that is to the Rest and Quietness of his faithful Subjects, and to pull away Misdoers among them charitably: And therefore he will be contented that his Justices shall help forth the Offenders according to the Truth as far as Reason and Justice may suffer. And as the King will be contented therein, it is to presume that the Counsel will be contented; and so there is no Danger thereby, neither to the Court ne to the Party. And as I suppose for this Reason it began that they should have no Counsel upon Indictments, and that hath so long continued,

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that it is now grown into a Custom, and into a Maxime of the Law, that they shall none have.

Doct. But if the Judges knew of their own Knowledge that the Indictee was Guilty, and then he pleadeth Misnosmer, or a Record that he was auterfoits arraigned, and acquit of the same Murther or Felony, and the Judges of their own Knowledge know that the Plea is untrue, may they not then bid him plead at his Peril?

Stud. I think yes: But if they know of their own Knowledge that he were guilty of the Murther or Felony, but that the Plea was untrue they knew not, but by Conjecture or Information, I think they might not then bid him plead at his Peril.

CHAP. XLIX.

¶ The second Question of the Doctor, Whether Warranty of the younger Brother that is taken as Heir because it is not known but that the eldest Brother is dead, be in Conscience a Bar unto the eldest Brother, as it is in Law?

Doct. A Man seised of Lands in Fee hath Issue two Sons, the eldest Son goeth beyond the Sea, and because a common Voice is that he is dead, the younger Brother is taken for Heir, the Father dieth, the younger Brother entreth as Heir, and alieneth the Land with a Warranty, and dieth without any Heir of his Body, and after the eldest Brother cometh

cometh again, and claimeth the Land as Heir to his Father: Whether shall he be barred by that Warranty in Conscience, as he is in the Law?

Stud. It is a Maxime in the Law, that the eldest Brother shall in that Case be barred; and that Maxime is taken to be of as strong Effect in the Law, as if it were ordained by Statute to be a Bar. And it is as old a Law that such a Warranty shall bar the Heir, as it is that the Inheritance of the Father shall only descend to the eldest Son. And sith the Law so is, why then should not Conscience follow the Law, as well as it doth in that Point, that the eldest Son shall have the Land?

Doct. For there appeareth no reasonable Cause whereupon the Maxim ought to have a lawful beginning: For what Reason is it that the Warranty of an Ancestor that hath no Right to Land should bar him that hath Right? And if it were ordained by Statute, that one Man should have another Man's Land, and no Cause is expressed why he should have it; in that Case, though he might hold the Land by Force of that Statute, yet he could not hold it in Conscience, without there was a Cause why he should have it. And these Cases be not like, as me seemeth, to the Forfeiture of Goods by an Outlawry: For I will agree for this Time, that that Forfeiture standeth with Conscience, because it is ordained for ministration of Justice; but I cannot perceive any such Case here: And therefore methinketh that this Case is like to the Maxim that was at the Common Law of Wreck of the Sea, that is to say, that if a

Man's Goods had been wrecked upon the Sea, that the Goods should have been immediately forfeited to the King. And it is holden by all Doctors, that that Law is against Conscience, except in certain Cases that were too long to rehearse now. And it was ordained by the Statute of West. 1. that if a Dog or Cat come alive to the Land, that the Owner, if he prove the Goods within a Year and a Day to be his, shall have them; whereby the said Law of Wrecks of the Sea is made more sufferable than it was before. And some think in this Case that this Warranty is no Bar in Conscience, though it be a Bar in the Law.

Stud. I pray thee keep that Case of Wreck of the Sea in thy Remembrance, and put it hereafter as one of thy Questions, and thereupon shew me farther thy Mind therein, and I shall with good-will shew thee my Mind. And as to this Case that we be in now, methinketh the Maxime whereby the Warranty shall be a Bar is good and reasonable; for it seemeth not against Reason that a Man shall be bound, as to temporal Things, by the Act of his Ancestor to whom he is Heir: For like as by the Law it is ordained, that he shall have Advantage by the same Ancestor, and have all his Lands by Discent, if he have any Right; so it seemeth that it is not unreasonable, though the Law, for the Privity of Blood that is between them, suffer them to have a Disadvantage by the same Ancestor. But if the Maxime were, that if any of his Ancestors, though he were not Heir to him, made such a Warranty, that it should be a Bar; I think that Maxime were against Con-

Conscience, for in that Case there were no Ground nor Consideration to prove how the said Maxime should have a lawful beginning, wherefore it were to be taken as a Maxime against the Law of Reason. But methinketh it is otherwise in this Case, for the Reason that I have made before.

Doct. If the Father bind him and his Heirs to the Payment of a Debt, and die; in that Case the Son shall not be bound to pay the Debt, unless he have Assets by discent from his Father. And so I would agree, that if this Man have Assets by discent from the Ancestor that made the Warranty, that he should have been barred: But else methinketh it should stand hardly with Conscience that it should be a Bar.

Stud. In that Case of the Obligation the Law is as thou sayest; and the Cause is, for that the Maxime of the Law in that Case is none other, but that he shall be charged if he have Assets by discent: But if the Maxime had been general, that the Heir should be bound in that Case without any Assets, or if it were ordained by Statute that it should be so, I think that both the Maxime and the Statute should well stand with Conscience. And like Law is, where a Man is vouched as Heir, he may enter as he that hath nothing by Discent: But where he claimeth the Land in his own Right, there the Warranty of his Ancestor shall be a Bar to him, though he have no Assets from the same Ancestor: And though it be said in Ezechiel cap. 18. That the Son shall not bear the Wickedness of the Father, that

that is understood Spiritually. But as to Temporal Goods, the Opinion of Doctors is, that the Son sometime may bear the Offence of his Father.

Doct. Now that I have heard thy Mind in this Case, I will take Advisement therein till a better Leisure, and will now proceed to another Question.

Stud. I pray thee do as thou sayest, and I shall with good-will make Answer thereto as well as I can.

CHAP. L.

¶ The third Question of the Doctor; If a Man prosecute a collateral Warranty, to extinct a Right that he knoweth another Man hath to Land, whether it be a Bar in Conscience, as it is in Law, or not?

Doct. A Man is disseised of certain Land, the Disseisor selleth the Land, &c. the Alienee knowing of the Disseisin, obtaineth a Release with a Warranty of an Ancestor collateral to the Disseisee, that knoweth also the Right of the Disseisee; that Ancestor collateral dieth, after whose Death the Warranty descendeth upon the Disseisee: Whether may the Alienee in that Case hold the Land in Conscience as he may by the Law?

Stud. Sith the Warranty is descended upon him, whereby he is barred in the Law, methinketh that he shall also be barred in Conscience; and that this Case is like to the Case

in

in the next Chap. before, wherein I have said, that (as methinketh) it is a Bar in Conscience.

Doct. Though it might be taken for a Bar in Conscience in that Case, yet methinketh in this Case it cannot. For in that Case the younger Brother entred as Heir, knowing none other but that he was Heir of Right, and after, when he sold the Land, the Buyer knew not but that he that sold it had good Right to sell it, and so he was ignorant of the Title of the eldest Brother; and that Ignorance came by the Default and Absence of himself that was the eldest Brother: But in this Case as well the Buyer, as he that made the collateral Warranty, knew the Right of the Disseisee, and did that they could to extinct the Right, and so they did as they would not should have been done to them: And so it seemeth that he that hath the Land may not with Conscience keep it.

Stud. Though it be as thou sayest that all they offended in obtaining of the said collateral Warranty; yet such Offence is not to be considered in the Law, but it be in very special Cases: For if such Alledgings should be accepted in the Law, Releases and other Writings should be of small Effect, and upon every light Surmise all Writings might come in Trial, whether they were made with Conscience or not. Therefore to avoid that Inconvenience, the Law will drive the Party to answer only whether it be his Deed or not, and not whether the Deed were made with Conscience or against Conscience: And though the Party may be at a mischief thereby, yet the Law will rather suffer

the Mischief than the said Inconvenience. And like Law is, if a Woman-covert for dread of her Husband by compulsion of him levy a Fine, yet the Woman after her Husband's Death shall not be admitted to shew that Matter in avoiding of the Fine, for the Inconvenience that might follow thereupon. And after the Opinion of many Men, there is no Remedy in these Cases in the Chancery. For they say that where the Common Law, in Cases concerning Inheritance, putteth the Party upon any Averment for eschewing of an Inconvenience that might follow of it among the People, that if the same Inconvenience should follow in the Chancery, if the same Matter would be pleaded there, that no Subpœna should lie in such Cases: And so it is in the Cases before rehearsed; for as much Vexation, Delay, Costs and Expences might grow to the Party, if he should be put to answer to such Averments in the Chancery, as if he were put to answer for them at the Common Law: And therefore they think that no Subpœna lieth in the said Cases, ne in other like unto them. Nevertheless I do not take it that their Opinion is, that he that bought the Land in this Case may with good Conscience hold the Land, because he shall not be compelled by no Law to restore it; but that he is in Conscience and by the Law of Reason bound to restore it, or otherwise to recompence the Party, so as he shall be contented. And I suppose verily it is so, if he will keep his Soul out of Peril and Danger. And after some Men, to these Cases may be resembled the Case of a Fine with Non-claim, that is remembred before in the 24 Chap.
of

of this Book, where a Man knowing another to have Right to certain Land, causeth a Fine to be levied thereof with Proclamation, and the other suffereth five Years to pass without Claim; in that Case he hath no Remedy neither by Common Law, nor by Subpœna, and that yet he that levied the Fine is bound to restore the Land in Conscience. And methinketh I could right well agree, that it should be so in this Case, and that specially, because the Party himself knoweth perfectly that the said collateral Warranty was obtained by Covin and against Conscience.

CHAP. LI.

¶ The fourth Question of the Doctor is of the Wreck of the Sea.

Doct. I Pray thee let me now hear thy Mind how the Law of England concerning Goods that be wrecked upon the Sea may stand with Conscience, for I am in great doubt of it.

Stud. I pray thee let me first hear thine Opinion, what thou thinkest therein.

Doct. The Statute of West. 1. that speaketh of Wrecks is, That if any Man, Dog, or Cat, come alive unto the Land out of a Ship, or Barge, that it shall not be judged for Wreck: So that if the Party to whom the Goods belong come within a Year and a Day, and prove them to be his, that he shall have them; or else that they shall remain to the King. And methinketh that

that the said Statute standeth not with Conscience; for there is no lawful Cause why the Party ought to forfeit his Goods, ne the King or Lords ought to have them, for there is no Cause of Forfeiture in the Party, but rather a Cause of Sorrow or Heaviness; and so the Law seemeth to add Sorrow upon Sorrow. And therefore Doctors hold commonly, That he that hath such Goods is bound to Restitution, and that no Custom may help; for they say it is against the Commandment of God, Levit. 19. where it is commanded, that a Man shall love his Neighbour as himself, and that they say he doth not that taketh away his Neighbour's Goods. But they agree, That if any Man have Cost and Labour for the saving of such Goods wrecked, specially for such Goods as would perish if they lay still in the Water, as Sugar, Paper, Salt, Meal, and such other, that he ought to be allowed for his Costs and Labour, but he must restore the Goods, except he could not save them without putting his Life in Jeopardy for them; and then if he put his Life in such Jeopardy, and the Owner by common Presumption had had no way to have saved them, then it is most commonly holden that he may keep the Goods in Conscience. But of other Goods that would not so lightly perish, but that the Owner might of common Presumption save them himself, or that might be saved without any Peril of Life, the Takers of them be bound to Restitution to the Owner, whether he come within the Year or after the Year.

And methinketh this Case is somewhat like to a Case that I shall put. If there were a Law and Custom in this Realm, or if it were ordained by Statute, that if any Alien came through the Realm in Pilgrimage, and died, that all his Goods should be forfeit; that Law should be against Conscience, for there is no Cause reasonable why the said Goods should be forfeit: And no more methinketh there is of Wreck.

Stud. There be divers Cases where a Man shall leese his Goods, and no Default in him: As where Beasts stray away from a Man, and they be taken up and proclaimed, and the Owner hath not heard of them within the Year and the Day, though he made sufficient Diligence to have heard of them; yet the Goods be forfeited, and no Default in him. And so it is where a Man killeth another with the Sword of John at Stile, the Sword shall be forfeit as a Deodand, and yet no Default is in the Owner. And so methinketh it may be in this Case; and that sith the Common Law, before the said Statute, was, That the Goods wrecked upon the Sea shall be forfeit to the King, that they be also forfeited now after the Statute, except they be saved by following the Statute; for the Law must needs reduce the Properties of all Goods to some Man; and when the Goods be wrecked, it seemeth the Property is in no Man: But admit that the Property remain still in the Owner, then if the Owner, percase, would never claim, then it should not be known who ought to have them, and so might they be destroyed, and no Profit come of them: Wherefore methinketh it reasonable

able that the Law shall appoint who ought to have them, and that hath the Law appointed to the King, as Sovereign and Head over the People.

Doct. In the Cases that thou hast put before of the Stray and Deodand there be Considerations why they be forfeit, but it is not so here: And methinketh that in this Case, it were not unreasonable that the Law would suffer any Man that would take them, to take and keep them to the Use of the Owner, saving his reasonable Expences; and this methinketh were more reasonable Law, than to pull the Property out of the Owner without Cause. But if a Man in the Sea cast his Goods out of the Ship as forsaken, there Doctors hold that every Man may take them lawfully that will: But otherwise it is (as they say) if he throw them out for fear that they should overcharge the Ship.

Stud. There is no such Law in this Realm of Goods forsaken: For though a Man wave the Possession of his Goods, and saith he forsaketh them, yet by the Law of the Realm the Property remaineth still in him, and he may seise them after when he will. And if any Man in the mean time put the Goods in Safegard to the Use of the Owner, I think he doth lawfully, and that he shall be allowed for his reasonable Expences in that Behalf, as he shall be of Goods found; but he shall have no Property in them, no more than in Goods found. And I would agree, That if a Man prescribe, that if he find any Goods within his Manor, that he should have them as his own, that that Prescription

ſcription were void: For there is no Conſideration how the Preſcription might have a lawful Beginning, but in this Caſe methinketh there is.

Doct. What is that?

Stud. It is this: The King, of the old Cuſtom of the Realm, as the Lord of the narrow Sea, is bound, as it is ſaid, to ſcour the Sea of the Pirates and petit Robbers of the Sea; and ſo it is read of the noble King Saint Edgar, that he would twice in the Year ſcour the Sea of ſuch Pirates: But I mean not thereby that the King is bound to conduct his Merchants upon the Sea againſt all outward Enemies, but that he is bound only to put away ſuch Pirates and petit Robbers. And becauſe that cannot be done without great Charge, it is not unreaſonable if he have ſuch Goods as be wrecked upon the Sea toward the Charge.

Doct. Upon that Reaſon I will take a Reſpite till another Time.

CHAP. LII.

¶ The fifth Queſtion of the Doctor; Whether it ſtand with Conſcience to prohibit a Jury of Meat and Drink till they be agreed.

If one of the 12 Men of an Enqueſt know the very Truth of his own Knowledge, and inſtructeth his Fellows thereof, and they will in no wiſe give Credence to him, and thereupon, becauſe Meat and Drink is prohibited them, he is driven to that Point, that either he muſt aſſent

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to them, and give their Verdict against his own Knowledge, and against his own Conscience, or die for lack of Meat: How may the Law then stand with Conscience, that will drive an Innocent to that Extremity, to be either forsworn, or to be famished and die for want of Meat?

Stud. I take not the Law of the Realm to be, that the Jury after they be sworn may not eat nor drink till they be agreed of the Verdict: But Truth it is, there is a Maxime and an old Custom in the Law, that they shall not eat nor drink after they be sworn, till they have given their Verdict, without the Assent and Licence of the Justices. And that is ordained by the Law for eschewing of divers Inconveniencies that might follow thereupon, and that specially if they should eat or drink at the Costs of the Parties; and therefore if they do contrary, it may be said in an Arrest of the Judgment: But with the Assent of the Justices they may both eat and drink. As if any of the Jurors fall sick before they be agreed of their Verdict, so sore that he may not commune of the Verdict, then by the Assent of the Justices he may have Meat and Drink, and also such other things as be necessary for him; and his Fellows also at their own Costs, or at the indifferent Costs of the Parties, if they so agree, or by the Assent of the Justices, may both eat and drink. And therefore if the Case happen that thou now speakest of, and that the Jury can in no wise agree in their Verdict, and that appeareth to the Justices by Examination, the Justices may in that Case suffer them to have both

both Meat and Drink for a Time, to see whether they will agree: And if they will in no wise agree, I think that the Justices may set such Order in the Matter as shall seem to them by their Discretion to stand with Reason and Conscience, by awarding of a new Enquest, and by setting Fine upon them that they shall find in Default, or otherwise as they shall think best by their Discretion; like as they may do if one of the Jury die before Verdict, or if any other like Casualties fall in that behalf. But what the Justices ought to do in that Case that thou hast put, in their Discretion, I will not treat of at this Time.

CHAP. LIII.

¶ The sixth Question of the Doctor; Whether the Colours that be given at the Common Law in Assises, Actions of Trespass, and divers other Actions, stand with Conscience, because they be most commonly feigned, and be not true.

Doct. I Pray thee let me hear thy Mind to what Intent such Colours be given, and sith they be commonly untrue, how they may stand with Conscience?

Stud. The Cause why such Colours be given is this: There is a Maxime and a Ground of the Law of England, that if the Defendant or Tenant in any Action plead a Plea that amounteth to the general Issue, that he shall be compelled to take the general Issue; and if he will not, he shall be condemned for lack of answer;

swer: And the general Issue in Assise is, That he that is named the Disseisor hath done no Wrong, nor no Disseisin; and in a Writ of Entry in the Nature of Assise the general Issue is, That he disseised him not; and in an Action of Trespass, that he is not guilty. And so every Action hath his general Issue assigned by the Law: And the Tenant must of Necessity either take the general Issue, or plead some Plea in Abatement of the Writ, to the Jurisdiction, to the Party, or else some Bar, or some Matter by way of Conclusion. And therefore if John at Stile infeoff H. Hart of Land, and a Stranger bringeth an Assise against the said H. Hart for the Land, whose Title he knoweth not; in this Case, if he should be compelled to plead to the Point of the Assise, that is to say, that he hath done no Wrong, ne no Disseisin, the Matter should be put to the Mouths of xii Laymen, which be not learned in the Law; and therefore better it is that the Law be so ordered, that it be put in the Determination of the Judges, than of Lay-men. And if the said H. Hart, in the Case before rehearsed, would plead in Bar of the Assise, that John at Stile was seised, and enfeoffed him, by Force whereof he entred, and asked Judgment if that Assise should lie against him; that Plea were not good, for it amounteth but to the general Issue; and therefore he shall be compelled to take the general Issue, or else the Assise shall be awarded against him for lack of Answer. And therefore to the Intent the Matter may be shewed and pleaded before the Judges, rather than before the Jury, the Tenants use to give

the Plaintiff a Colour, that is to say, a Colour of Action, whereby it shall appear that it were hurtful to the Tenant to put that Matter that he pleadeth to the Judgment of xii Men: And the most common Colour that is used in this Case is this; When he hath pleaded that such a Man enfeoffed him, as before appeareth, it is used that he shall plead farther, and say that the Plaintiff claiming by a Colour of a Deed of Feoffment made by the said Feoffor before the Feoffment made to him, where no Right passed by the Deed, entred, upon whom he entred, and asked Judgment if the Assise lie against him. In this Case, because it appeareth to be a doubt to unlearned Men, whether the Land passed by the Deed without Livery or not, therefore the Law suffereth the Tenant to have that special Matter to bring the Matter to the Determination of the Judges. And in such Case the Judges may not put the Tenant from the Plea, for they knew not as Judges but that it is true; and so if any Default be, it is in the Tenant, and not in the Court. And though the Truth be, That there were no such Deed of Feoffment made to the Plaintiff as the Tenant pleadeth; yet methinketh there is no Default in the Tenant, for he doth it to a good Intent, as before appeareth.

Doct. If the Tenant know that the Feoffor made no such Deed of Feoffment to the Plaintiff, then there is a Default in the Tenant to plead it, for he wittingly saith against the Truth; and it is holden by all Doctors, that every Lie is an Offence, more or less; for if it be

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of Malice, and to the Hurt of his Neighbour, then it is called mendacium perniciosum, and that is deadly Sin; and if it be in Sport, and to the Hurt of no Man, nor of Custom used, ne of Pleasure that he hath in lying, then it is venial Sin, and it is called in Latin mendacium jocosum; and if it be to the Profit of his Neighbour, and to the Hurt of no Man, then it is also venial Sin, and it is called in Latine mendacium officiosum; and tho' it be the least of those three, yet it is a venial Sin, and would be eschewed.

Stud. Though the Midwives of Ægypt lied when they had reserved the Male-Children of the Hebrews, saying to the King Pharaoh, that the Hebrews had Women that were cunning in the same Craft, which ere they came had reserved the Children alive, where indeed they themselves of pity and of dread of God reserved them; yet Saint Hierome expoundeth the Text following, which saith, That our Lord therefore gave them Houses, that is to be understood, that he gave them spiritual Houses, and that they had therefore eternal Reward: And if they sinned by that Lie, although it were but venial, yet I cannot see how they should have therefore eternal Reward. And also if a Man, intending to slay another, ask me where that Man is; is it not better for me to lie, and say I cannot tell where he is, though I know it, than to shew where he is, whereupon Murther should follow?

Doct. The Deed that the Midwives of Ægypt did, in saving the Children, was meritorious, and deserved Reward everlasting, if they believed in God, and did good Deeds beside, as it is

is to suppose they did, when they for the Love of God refused the Death of the Innocents: And then though they made a Lie after, which was but venial Sin, that could not take from them their Reward, for a venial Sin doth not utterly extinct Charity, but letteth the Fervour thereof: And therefore it may well stand with the Words of Saint Hierome, that they had for their good Deed eternal Houses, and yet the Lie that they made to be a venial Sin. But nevertheless, if such a Lie that is of it self but venial be affirmed with an Oath, it is always mortal, if he know it be false that he sweareth. And to the other Question, it is not like to this Question that we have in Hand, as me seemeth: For sometime a Man for the eschewing of the greater Evil may do a less Evil, and then the less is no Offence in him; and so it is in the Case that thou hast put, wherein because it is less Offence to say he woteth not where he is, though he know where he is, than it is to shew where he is, whereupon Murther should follow, it is therefore no Sin to say he woteth not where he is: For every Man is bound to love his Neighbour, and if he shew in this Case were he is, knowing his Death should follow thereupon, it seemeth that he loved him not, ne that he did not to him as he would be done to. But in the Case that we be in here, there is no such Sin eschewed: For though the Party pleadeth the general Issue, the Jury might find the Truth in every thing; and therefore in that he saith that the Plaintiff, claiming in by the Colour of a Deed of Feoffment, where nought passed, entred, &c. knowing that there was no such Feoffment, it was

was a Lie in him. and a venial Sin, as methinketh. And every Man is bound to suffer a deadly Sin in his Neighbour, rather than a venial Sin in himself.

Stud. Though the Jury upon a general Issue may find the Truth, as thou sayest, yet it is much more dangerous to the Jury to inquire of many Points, than to inquire only of one Point. And forasmuch as our Lord hath given a Commandment to every Man upon his Neighbour; therefore every Man is bound to force as much as in him is, that by him no Occasion of Offence come to his Neighbour. And for the same Cause the Law hath ordained divers Maxims and Principles, whereby Issue in the King's Court may be joined upon one Point in certain, as nigh as may be, and not generally, lest Offence might follow thereupon against God, and a Hurt also unto the Jury. Wherefore it seemeth that he loveth not his Neighbour as himself, ne that he doth not as he would be done to, that offereth such Danger to his Neighbour, where he may well and conveniently keep it from him, if he will follow the Order of the Law; and it seemeth that he putteth himself wilfully in Jeopardy that doth it, as it is written, Eccles. 3. Qui amat periculum in illo peribit, that is to say, he that loveth Peril shall perish in it, and he that putteth his Neighbour in Peril to offend, putteth himself in the same, and so should he do, meseemeth, that would wilfully take the general Issue, where he might conveniently have the special Matter. And furthermore, it is no Offence in Princes and Rulers to suffer Contracts, and buying and selling in Markets and Fairs, though

though both Perjury and Deceit should follow thereupon; because such Contracts be necessary for the Commonwealth: So it seemeth likewise, that there is no Default in the Party that pleadeth such a special Matter, to avoid from his Neighbour the danger of Perjury, ne yet in the Court, though they induce him to it, as they do sometime for the Intent before rehearsed. And in like wise some will say, That if Rulers of Cities and Commonalties sometime for the Punishment of Felons, Murtherers, and such other Offenders, will (to the Intent they would have them confess the truth) say to them that be suspected, that they be informed of such certain Defaults or Misdemeanors in the Offenders, and that they do to the Intent to have them confess the Truth, that though they were not so informed, that yet it is no Offence to say they were so informed, because they do it for the common Wealth: For if Offenders were suffered to go unpunished, the Commonwealth would eftsoons decay and utterly perish.

Doct. I will take advisement upon thy Reason in this Matter till another Season, and I will now ask thee another Question somewhat like unto this: I pray thee let me hear thy Mind therein.

Stud. Let me hear thy Question, and I shall with good-will say as I think therein.

CHAP.

CHAP. LIV.

¶ The seventh Question of the Doctor, concerning the Pleadings in Assise, whereby the Tenants use sometime to plead in such Manner that they shall confess no Ouster.

Doct. IT is commonly used, as I have heard say, that when the Tenant in Assise pleadeth that a Stranger was seised and enfeoffed him, and giveth the Plaintiff a Colour in such Manner as before appeareth in the xlviii Chapter, that the Tenant many Times, when he hath pleaded thus, and the Plaintiff claiming by a Colour of a Deed of Feoffment made by the said Stranger, where nought passed by the Deed, entred; and that then they use to say farther, upon whom A. B. entred, upon whom the Tenant entred; where indeed the said A. B. never entred, ne haply there was no such Man: How can this Pleading be excused of an Untruth? And what reasonable Cause can be why such a Pleading should be suffered against the Truth?

Stud. The Cause why that Manner of Pleading is suffered as this: If the Tenant by his Pleading confessed an immediate Entry upon the Plaintiff, or an immediate putting out of the Plaintiff, which in French is called an Ouster; then if the Title were after found for the Plaintiff, the Tenant by his Confession were attainted of the Disseisin. And

And because it may be, that though the Plaintiff have good Title to the Land, that yet the Tenant is no Disseisor, therefore the Tenants use many Times to plead in such Manner as thou hast said before, to save themselves from confessing of an Ouster: And so if there be any Default, it is not in the Court, ne in the Law, for they know not the Truth therein till it be tried. And methinketh also that there is in this Case right little Default or none in the Tenant, nor in his Counsel, specially if the Counsel know that the Tenant is no Disseisor. But as to that Point, I pray thee, that as thou hast taken a Respite to be advised, or that thou shew thy full Mind in the Question of a Colour given in Assise, whereof mention is made in the said xlviij Chapter, that I likewise may have a like Respite in this Case till another Time, to be advised, and then I shall with good-will shew thee my full Mind therein.

Doct. I am content it be as thou sayest. But I pray thee that I may yet add another Question to the two Questions before rehearsed of Colours in Assise, and feel thy Mind therein, because that soundeth much to the same Effect that the other do, (that is to say) to prove that there be divers Things suffered in the Law to be pleaded that be against the Truth: And I pray thee let me hereafter know thy Mind in all three Questions, and thou shalt then with a good-will know mine.

Stud. I pray thee shew me the Case that thou speakest of.

Doct. If a Man steal a Horse secretly in the Night, it is used that thereupon he shall be indicted at the King's Suit, and it is used that in that Indictment it shall be supposed that he such a Day and Place with Force and Arms, (that is to say) with Staves, Swords, and Knives, &c. feloniously stole the Horse against the King's Peace; and that Form must be kept in every Indictment, though the Felon had neither Sword nor other Weapon with him, but that he came secretly without Weapon: How can it therefore be excused, but there is an untruth?

Stud. It is not alledged in the Indictment by Matter in Deed that he had such Weapon, for the Form of an Inditement is this.

Inquiratur pro Domino Rege, si A. tali die & anno apud talem locum vi & armis, videlicet Gladiis, &c. talem Equum talis hominis cepit, &c.

And then the twelve Men be only charged with the Effect of the Bill, that is to say, whether he be guilty of the Felony or not, and not whether he be guilty under such Manner and Form as the Bill specifieth or not: And so when they say Billa vera, they say true, as they take the Effect of the Bill to be. And therefore if there were false Latin in the Bill of Indictment, and the Jury saith Billa vera, yet their Verdict is true: For their Verdict stretcheth not to the truth or falshood of the Latin, but to the Felony, ne to the Form of the Words, but to the Effect of the Matter; and that is to enquire whether there were any such Felony done by the Person or not. And though the Bill vary from the Day, from the Year, and also from the Place where the Felony was done in, so it vary

vary not from the Shire that the Felony was done in, and the Jury saith Billa vera, they have given a true Verdict; for they are bound by their Oath to give their Verdict according to the Effect of the Bill, and not according to the Form of the Bill. And so is he that maketh a Vow bound likewise to that that by the Law is the Effect of his Avow, and not only to the Words of his Avow. And if a Man avow never to eat White-meat, yet in Time of extreme Necessity he may eat White-meat, rather than die, and not break his Avow, though he affirmed it with an Oath: For by the Effect of his Avow extreme necessity was excepted, though it were not expresly excepted in the Words of the Avow. And so likewise though the Words of the Bill be, to enquire whether such a Man, such a Day and Year, and in such a Place, did such a Felony; yet the Effect of the Bill is, to enquire whether he did the Felony within the Shire or no: And therefore the Justices before whom such Indictments be taken most commonly inform the Jury, that they are bound to regard the Effect of the Bill, and not the Form. And therefore there is no untruth in this Case, neither in him that made the Bill, ne yet in the Jury, as me seemeth.

Doct. But if the Party that owned the Horse bring an Action of Trespass, and declareth that the Defendant took the Horse with Force and Arms, where he took him without Force and Arms; how may the Plaintiff there be excused of an untruth?

Stud. And if the Plaintiff surmise an Untruth, what is that to the Court, or to the Law? For

they must believe the Plaintiff, till that that he saith be denied by the Defendant; and yet as this Case is, there is no untruth in the Plaintiff, to say he took the Horse with Force and Arms, though he came never so secretly and without Weapon: For every Trespass is in the Law done with Force and Arms; so that if he be attainted and found guilty of the Trespass he is attainted of the Force and Arms: And sith the Law judgeth every Trespass to be done with Force, therefore the Plaintiff saith truly, that he took him with Force, as the Law meaneth to be Force. For though he took the Horse as a Felon, yet upon the felonious taking the Owner may take an Action of Trespass if he will; for every Felony is a Trespass and more. And so I have shewed thee some Part of my Mind, to prove that in those Cases there is no untruth, neither in the Parties, neither in the Jury, nor in the Law. Nevertheless, at a better leisure I will shew thee my Mind more fully therein with good-will, as thou hast promised me to do in the Cases of Colours of the Assise and of the Ouster, that be before rehearsed.

CHAP.

CHAP. LV.

¶ The eighth Question of the Doctor, Whether the Statute of xlv of *Edward* the third, of *Sylva cædua*, stand with Conscience.

Doct. IN the 45 year of the Reign of Edw. 3. it was enacted, that a Prohibition should lie where a Man is impleaded in the Court-Christian for Dismes of Wood of the Age of xx Years or above, by the Name of Sylva cædua: How may that Statute stand with Conscience, that is so directly against the Liberty of the Church, and that is made of such Things as the Parliament had no Authority to make any Law of?

Stud. It appeareth in the said Statute, that it is enacted, That a Prohibition should lie in that Case as it had used to do before that Time; and if the Prohibition lay by a Prescription before the Statute, why is not then the Statute good as a Confirmation of that Prescription?

Doct. If there were such a Prescription before the Statute, that Prescription was void; For it prohibiteth the Payment of Tithes of Trees of the Age of xx year or above; and paying of Tithes is grounded as well upon the Law of God, as upon the Law of Reason; and against those Laws lieth no Prescription, as it is holden most commonly by all Men.

Stud. That there was such a Prescription before the said Statute, and that if a Man before the said Statute had been sued in the Spiritual Court for Tithes of Wood of the Age of xx years or above, the Prohibition lay, appeareth in the said Stat. and it cannot be thought that a Statute that is made by Authority of the whole Realm, as well of the King and of the Lords Spiritual and Temporal, as of all the Commons, will recite a thing against the Truth. And furthermore, I cannot see how it can be grounded by the Law of God, or by the Law of Reason, that the xth Part should be paid for Tithe, and no other Portion but that: But I think that it be grounded upon the Law of Reason, that a Man should give a reasonable Portion of his Goods Temporal to them that minister to him Things Spiritual; for every Man is bound to honour God of his proper Substance; and the giving of such Portion hath not been only used among faithful People, but also among unfaithful, as it appeareth Genesis 47. where Corn was given to the Priests in Ægypt of Common Barns. And Saint Paul in his Epistles affirmeth the same in many Places; as in his first Epistle to the Corinthians, Cha. 9 where he saith, He that worketh in the Church shall eat of that that belongeth to the Church: And in his Epistle to the Galatians, Chap. 6. he saith, Let him that is instructed in Spiritual Things, depart of his Goods to him that instructeth him. And Saint Luke, Chap. 10. saith That the Workman is worthy to have his hire. All which Sayings may right conveniently be taken and applied to this Purpose, that Spiritual Men, which minister to the People Spiritual Things, ought for their Ministration

tion to have a competent Living of them that they minister unto. But that the tenth Part should be assigned for such a Portion, and neither more nor less, I cannot perceive that that should be grounded by the Law of Reason, nor immediately by the Law of God. For before the Law written there was no certain Portion assigned for the Spiritual Ministers, neither the xth Part, nor the xifth Part, unto the Time of Jacob: For it appeareth Genesis 28. that Jacob avowed to pay Dismes, which was among the Jews for the tenth Part, if our Lord prospered him in his Journey; and if the tenth Part had been his Duty before that Avow, it had been in vain to have avowed it, and so it had if it had been grounded by the Law of Reason. And as to that is spoken in the Evangelists, and in the new Law, of Tithes, it belongeth rather to the giving of Tithes in the Time of the old Law, than of the new Law; as it appeareth Matth. 23. and Luke 11. where our Lord speaketh to the Pharisees, saying, Wo to you Pharisees, that tithe Mints, Rue, and Herbs, and forget the Judgment and the Charity of God; these it behoveth you to do, and the other not to omit: That is to say, it behoveth you to do Justice and Charity of God, and not to omit paying of Tithes, though it be of small Things, as of Mints, Rue, Herbs and such other. And also that the Pharisee saith, Luke 17. I pay my Tithes for all that I have, it is to be referred to the old Law, not to the Time of the new Law; therefore, as I take it, the paying of Tithes, or of a certain Portion to Spiritual Men for their Spiritual Ministration to the People, hath been grounded in

divers Manners. First, before the Law written, a certain Portion sufficient for the Spiritual Ministers was due to them by the Law of Nature, which, after them that be learned in the Law of the Realm, is called the Law of Reason; and that Portion is due by all Laws. And in the Law written, the Jews were bound to give the xth Part to their Priests, as well by the said Vow of Jacob, as by the Law of God in the Old Testament, called the Judicials. And in the new Law the paying of the xth Part is by a Law that is made by the Church. And the Reason wherefore the xth Part was ordained by the Church to be payed for the Tithe was this: There is no Cause why the People of the new Law ought to pay less to the Ministers of the new Law, than the People of the Old Testament gave to the Ministers of the Old Testament: For the People of the new Law be bound to greater Things than the People of the old Law were, as it appeareth Mat. 5. where it is said, Unless your good Works abound above the Works of the Scribes and Pharisees, ye may not enter into the Kingdom of Heaven. And the Sacrifice of the old Law was not so honourable as the Sacrifice of the new Law is: For the Sacrifice of the old Law was only the Figure, and the Sacrifice of the new Law is the Thing that is figured; that was the Shadow, this is the Truth. And therefore the Church upon that reasonable Consideration ordained, that the xth Part should be paid for the Sustenance of the Ministers in the new Law, as it was for the Sustenance of the Ministers in the old Law; and so that Law with a Cause may be increased or minished to more

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Portion or to less, as shall be necessary for them.

Doct. It appeareth Gen. 14. that Abraham gave to Melchisedec Dismes, and that is taken to be the xth Part; and that was long before the Law written: And therefore it is to suppose, that he did that by the Law of God.

Stud. It appeareth not by any Scripture that he did that by the Commandment of God, ne by any Revelation. And therefore it is rather to suppose that he did part of Duty, and part of his own free Will: For in that he gave the Dismes as a Reasonable Portion for the Sustenance of Melchisedec and his Ministers, he did it by the Commandment of the Law of Reason, as before appeareth; but that he gave the xth Part, that was of his free-will, and because he thought it sufficient and reasonable: But if he had thought the xiith Part or the xiiith Part had sufficed, he might have given it, and that with good Conscience. And so I suppose that in the new Law, the giving of the xth Part is by the Law of the Church, and not by the Law of God; unless it be taken that the Law of the Church is the Law of God, as it is sometime taken to be, but not appropriately or immediately; for that is taken appropriately to be the Law of God, that is contained in Scripture, that is to say, in the Old Testament and in the New.

Doct. It is somewhat dangerous to say that Tithes be grounded only upon the Law of the Church: For some Men, as it is said, say that Men's Law bindeth not in Conscience, and so they might happen to make a Boldness thereby to deny their Tithes.

Stud.

Stud. I trust there be none of that Opinion; and if there be, it is great Pity: And neverthe-less they be compelled in that Case by the Law of the Church to pay their Tithes, as well as they should be if paying of Tithes were grounded meerly upon the Law of God.

Doct. I think well it be as thou sayest, and therefore I hold me contented therein. But I pray thee shew me thy Mind in this Question: If a whole Country prescribe to pay no Tithes for Corn or Hay, nor such other, whether thou think that that Prescription is good?

Stud. That Question dependeth much upon that that is said before: For if paying of the xth Part be by the Law of Reason or by the Law of God, then the Prescription is void; but if it be by the Law of Man, then it is a good Prescription, so that the Ministers have a sufficient Portion beside.

Doct. John Gerson, which was a Doctor of Divinity, in a Treatise that he named Regulæ morales, saith, that Dismes be paid to Priests by the Law of God.

Stud. The Words that he speaketh there of the Matter be these, Solutio Decimarum Sacerdotibus est de jure divino, quatenus inde sustententur; sed quod tam hanc vel illam assignare, aut in alios redditus commutare, positivi juris existit: That is thus much to say, The paying of Disms to Priests is of the Law of God, that they may thereby be sustained; but to assign this Portion or that, or to change it to other Rents, that is by the Law positive. And if it should be taken that by that Word Decimarum, which in English is called Dismes or Tithes, that he meant the xth Part, and

and that that xth Part should be paid for Tithe by the Law of God, then is the Sentence that followeth after against that Saying; for as it appeareth above, the next saith afterward thus; But to assign this Portion or that, or to change it into other Rents, belongeth to the Law positive, that is, to the Law of Man: And if the xth Part were assigned by God, then may not a less Part be assigned by the Law of Man, for that should be contrary to the Law of God, and so it should be void. And methinketh that it is not so likely that so famous a Clerk would speak any Sentence contrary to the Law of God, or contrary to that he had spoken before. And to prove he meant not by the Term Decimæ, that Dismes should always be taken for the xth Part, it appeareth in the 4 Part of his Works, in the 32 Title Literæ, where he saith thus, Non vocatur Portio Curatis debita propterea Decimæ, eo quod semper sit decima pars, imo est interdum vicesima aut tricesima: That is to say, The Portion due to Curates is not therefore called Dismes, for that it is alway the xth Part, for sometime it is the xxth or the xxxth Part. And so it appeareth that by this Word Decimarum he meant in the Text before rehearsed a certain Portion, and not precisely the xth Part: And that the Portion should be paid to Priests by the Law of God, to sustain them with, taking as it seemeth the Law of Reason in that saying for the Law of God, as it may one way be well and conveniently taken, because the Law of Reason is given to every reasonable Creature by God: And then it followeth pursuantly, that it belongeth to the Law of Man to assign this Portion, or that which Necessity shall require

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require for their Sustenance. And then his Saying agreeth well to that that is said before, that is to say, that a certain Portion is due for Priests, for their spiritual Ministration, by the Law of Reason. And then it would follow thereupon, that if it were ordained for a Law, that all paying of Tithes should from henceforth cease, and that every Curate should have assigned to him such certain Portion of Land, Rent, or Annuity, as should be sufficient for him, and for such Ministers as should be necessary to be under him, according to the Number of the People there, or that every Parishioner or Housholder should give a certain Sum of Money to that Use; I suppose the Law were good. And that was the Meaning of John Gerson as it seemeth, in his Words before rehearsed, where he saith, But to change Tithes into other Rents, is by the Law positive, that is to say, by the Law of Man. And some think that if a whole Country prescribe to be quit of both Tithes of Corn and Grass, so that the spiritual Ministers have a sufficient Portion beside to live upon, that is a good Prescription, and that they should not offend that in such Countries paid no Tithes: For it were hard to say that all the Men of Italy, or of the East Parts, be damned, because they pay no Tithes, but a certain Portion after the Custom. Therefore certain it is, to pay such a certain Portion, as well they as all other be bound, if the Church ask it, any Custom notwithstanding. But if the Church ask it not, it seemeth that by that not asking the Church remitteth it; And an Example thereof we may take of the Apostle Paul, that though

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he might have taken his necessary Living of them that he preached to, yet he took it not, and nevertheless they that gave it him not, did not offend, because he did not ask it. But if one Man in a Town would prescribe to be discharged of Tithes of Corn and Grass, methinketh the Prescription is not good, unless he can prove that he recompenseth it in another thing: For it seemeth not reasonable that he should pay less for his Tithes than his Neighbours do, seeing that the spiritual Ministers are bound to take as much Diligence for him, as they be for any other of that Parish: Wherefore it might stand with Reason that he should be compelled to pay his Tithes as his Neighbours do, unless he can prove that he payeth in Recompence thereof more than the xth Part in another thing. Nevertheless, I leave the Matter to the Judgment of other. And then for a farther Proof, though the said Prescription of not paying Tithes for Trees of xx Years and above were not good, yet that that of Corn and Grass should be good some make this Reason; they say that there is no Tithe but it is either a predial Tithe, or a personal Tithe, or a mixt Tithe. And they say that if a Tithe should be paid of Trees when they be sold, that the Tithe were not a predial Tithe; for the predial Tithe of Trees is of such Trees as bring forth Fruits and Increase yearly, as Apple-trees, Nut-trees, Pear-trees, and such other, whereof the predial Tithe is the Apples, Nuts, Pears, and such other Fruits as come of them yearly: And when the Fruits be tithed, if the Owner after sell the Trees, there is no Tithe due thereby, for two Tithes

Tithes may not be paid of one thing. And of those Tithes, that is to say, of predial Tithes, was the Commandment given in the old Law to the Jews, as appeareth Levit. 27. where it is said, Omnes decimæ terræ, sive de pomis arborum, sive de frugibus, Domini sunt, & illi sanctificantur; that is to say, All Tithes of the Earth, either of Apples of Trees, or of Grains, be our Lord's, and to him they be sanctified: And though the said Law speaketh only of Apples, yet it is understood of all Manner of Fruits. And because it saith that all the Tithes of the Earth be our Lord's, therefore Calves, Lambs, and such other must also be tithed: And they be called by some Men predial Tithes, that is to say, Tithes that come of the Ground; howbeit they call them only Predials mediate; and they be the same Tithes that in this Writing be called mixt Tithes, and the other Tithes, that is to say, Tithes of Apples and Corn, and such other, be called Predials immediate, for they come immediately of the Ground, and so do not mixt Tithes, as evidently appeareth.

Doct. But what thinkest thou shall be the predial Tithes of Ashes, Elms, Sallows, Alders, and such other Trees as bear no Fruits whereof any Profit cometh? Why shall not the xth Part of the self thing be the Tithe thereof, if they be cut down, as well as it is of Corn and Grass?

Stud. For I think that there is to that Intent great Diversity between Corn, Grass, and Trees; and that for divers Considerations, whereof one is this, The Property of Corn and Grass is not to grow over one Year, and if it do, it will perish and

and come to nought, and so the cutting down of it is the Perfection and Preservation thereof, and the special Cause that any Increase followeth of the same; and therefore the xth Part of the Increase shall be paid as a predial Tithe, and there no Deduction shall be made for the Charges of it: and so it is of Sheep and Beasts, that must be taken and killed in Time, for else they may perish and come to nought: But when Trees be felled, that felling is not the Perfection of the Trees, ne it causeth not them to increase, but to decay; for most commonly the Trees would be better, if they might grow still. And therefore upon that that is the Cause of the Decay and Destruction of them, it seems there can no predial Tithe arise. And some Men say, that this was the Cause why our Lord in the said Chap. of Levit. 27. gave no Commandment to tithe the Trees, but the Fruits of the Trees only.

Doct. It appeareth it Paralip. 31. that the Jews in the Time of the King Ezechias offered in the Temple all things that the Ground brought forth; and that was Trees as well as Corn and Grass.

Stud. It appeareth not that they did that by the Commandment of God, and therefore it is like that they did it of their own Devotion, and of a Favour that they had above their Duty to the repairing of the Temple, which the King Ezechias had then commanded to be repaired: And so that Text proveth nothing that Tithe should be paid for Trees. And therefore they say farther, that Truth it is, that if a Man to the Intent he would pay no Tithe, would wilfully suffer his Corn and Grass to stand still and to perish, he should offend Conscience thereby: But though he suffer his

his Trees to stand still continually without felling, because he thinketh a Tithe would be asked if he felled them, (so that he do it not of an evil Will to the Curate) he offendeth not in Conscience, ne he is not bound to Restitution therefore, as he should be if it were of Corn and Grass, as before appeareth. And another Diversity is this: In this Case of Tithe-wood, the Tithe thereof would serve so little to that Purpose that Tithes be paid for, that it is not likely that they that made the Law for Payment of Tithes intended that any Tithe should be payed for Trees or Wood: For the spiritual Ministers must of Necessity spend daily and weekly, and therefore the Tithes of Trees or Wood, that cometh so seldom, would serve so little to the Purpose that it should be paid for, that it would not help them in their Necessity: So that if they should be driven to trust thereto, though it might help him in whose time it should happen to fall, yet it should deceive them that trusted to it in the mean time, and also should leave the Parish without any to minister to them.

Doct. I would well agree, that for Trees that bear Fruit there should no predial Tithe be paid when they be sold, for the predial Tithe of them is the Fruits that come of them, and so there cannot be two Predials of one thing, as thou hast said. But of other Trees that bear no Fruit, methinketh that a predial Tithe should be paid when they be sold. And so it appeareth that there ought to be by the Constitution provincial made by the Reverend Father in God, Robert Winchelsey, late Archbishop of Canterbury, where it is said and declared, that *Sylva cadua*

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is of every kind of Trees that have being, in that they should be cut, or that be able to be cut; whereof we will, saith he, that the Possessor of the said Woods be compelled by the Censures of the Church to pay to the Parish-Church, or Mother-Church, the Tithe, as a real or predial Tithe. And so by Virtue of that Constitution provincial a predial Tithe must be paid of such Trees as have no Fruit: For I would well agree, that the said Constitution provincial stretched not to Trees that bear Fruit, although the Words be general to all Trees, (as before appeareth.)

Stud. I take not the Reason why a predial Tithe should not be paid for Trees that bear Fruit, to be because two predial Tithes cannot be paid for one thing: For when the Tithe is paid of Lambs, yet shall Tithe be paid of Wool of the same Sheep; for it is paid for another Increase: And so it may be said that the Fruit of a Tree is one Increase, and the felling another. But I take the Cause to be, for the two Causes before rehearsed; and also forasmuch as the felling is not properly an Increase of Trees, but a Destruction of the Trees as it is said before. And farther, I would hear thy Mind upon the said Constitution provincial, which will, that Tithe should be paid for Trees by the Possessors of the Wood; that if the Possessor sell the Wood for C l. and give the Buyer a certain Time to fell it in, what Tithe shall the Possessor pay as long as the Wood standeth.

Doct. I think none, for the predial Tithe cometh not till the Wood be felled: And a personal Tithe he cannot pay, no more than if a Man

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pluck down his House and selleth it, or if he sell all his Land, in which Cases I agree well he shall pay no Tithe, neither personal nor predial?

Stud. And then I put case that the Buyer selleth the Wood again as it is standing upon the Ground to another for CC l. what Tithe shall be paid then?

Doct. Then the first Buyer shall pay Tithe of the Surplusage that he taketh over the C l. that he paid as a personal Tithe.

Stud. And then if the second Buyer after that cut it down, and sell it when it is cut down for less than he paid, what Tithe shall then be paid?

Doct. Then shall he that selleth them pay the Tithe for the Trees as a predial Tithe.

Stud. I cannot see how that can be: For he neither hath the Trees that the predial Tithe should be paid for, if any ought to be paid; nor he is not Possessor of the Ground where the Trees grow. And therefore if any predial Tithe should be paid, it should be paid either by the first Possessor by Reason of the Words of the said Constitution provincial, which be, that the Tithe shall be paid by the Possessor of the Wood; or by the last Buyer, because he hath the Trees that should be tithed: And by the first Possessor the Tithe cannot be paid as a Predial; for he cut them not down, ne they were not cut down upon his Bargain; and by the last Buyer it cannot be paid neither as a predial Tithe, for the said Constitution saith, that the Possessor of the Woods should be compelled to pay it. And therefore I suppose that the Truth is, that in that Case no Tithe shall be paid: For as to the last Seller, he shall pay no personal Tithe, for he gained nothing,

thing, as it appeareth before; and no predial Tithe shall be paid, for it should be against the said Prescription; and also the cutting down is the Destruction of Trees, and not their Preservation, as is said before.

Doct. Then takest thou the said Constitution to be of small Effect, as it seemeth.

Stud. I take it to be of this Effect; That of Wood, above twenty Years, it bindeth not, because it is contrary to the Common Law, and to the said Prescription, that standeth good in the Common Law: But of Wood under xx Years, whereof Tithe hath been accustomed to be paid, the Constitution is not against the said Prescription, because paying of Tithe under xx Years is not prohibited, but suffered by the said Statute. Howbeit some say, that by the very Rigour of the Common Law Tithes should not be paid for Wood under xx Year, no more than for above xx Year, and that Prohibition in that Case lieth by the Common Law: Nevertheless, because it hath been suffered to the contrary, and that in many Places Tithe hath been paid thereof, I pass it over: But where Tithe hath not been paid of Wood under xx Years, I think none ought to be paid at this Day in Law nor Conscience. But admit that the said Constitution taketh Effect for Payment of the Wood under xx Years as of a predial Tithe, yet I cannot see how the Tithe thereof should be paid by the Possessor of the Wood, if he sell them, but that it should be paid rather by him that hath the Trees; for the Constitution is, that the Tithe shall be paid as a real or predial Tithe, and that is their Part of the same Trees, as it is of Corn. And if a Man buy Corn upon the Ground

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the Buyer shall pay the Tithe, and not the Seller: And so it would seem to be here. And what the Constitution meant, to decree the contrary in Tithe Wood, I cannot tell, unless the Meaning were to induce the Owners to pay Tithes of great Trees when they fell them to their own Use; which methinketh should be very hard to stand with Reason, though the said Stat. had never been made, as I have said before. And furthermore, I would here (under Correction) move one thing, and that is this; That, as it seemeth, that they that were at the making of the said Constitution, and knew the said Prescription, did not follow the direct Order of Charity therein so perfectly as they might have done: For when they made the said Constitution provincial directly against the said Prescription, they set Law against Custom, and Power against Power, and in a Manner the Spiritualty against the Temporalty, whereby they might well know that great Variance and Suit would follow. And therefore if they had clearly seen that the said Prescription had been against Conscience, they should first have moved the King and his Council, and the Nobles of the Realm, to have assented to the Reformation of that Prescription, and not to make a Law as it were by Authority and Power against the Prescription, and then to threat the People, and make them believe that they were all accursed that kept the said Prescription, or that maintained it. And it seemeth to stand hardly with Conscience to report so many to stand accursed for following of the said Stat. and of the said Prescription as there do, and yet to do no more than hath been done to bring them out of it.

Doct.

Doct. Methinketh that it is not convenient that Laymen should argue the Laws and the Decrees or Constitutions of the Church; and therefore it were better for them to give Credence to spiritual Rulers that have Cure of their Souls, than to trust to their own Opinions: And if they would do so, then such Matters would much the more rather cease than they will do by such Reasonings.

Stud. In that that belongeth to the Articles of the Faith, I think the People be bound to believe the Church, for the Church gathered together in the Holy Ghost cannot err in such things as belong to the Catholick Faith: But where the Church maketh any Laws whereby the Goods or Possessions of the People may be bound, or by this Occasion or that may be taken from them, there the People may lawfully reason whether the Laws bind them or not; for in such Laws the Church may err and be deceived, and deceive other, either for Singularity, or for Covertise, or some other Cause. And for that Consideration it pertaineth most to them that be learned in the Law of the Realm to know such Laws of the Church as treat of the ordering of Lands or Goods, and to see whether they may stand with the Laws of the Realm or not. And therefore it is necessary for them to know the Laws of the Church that treat of Dismes, of Executors, of Testaments, of Legacies, Bastardy, Matrimony, and divers other, wherein they be bound to know when the Law of the Church must be followed, and when the Law of the Realm: Whereof because it is not our Purpose to treat, I leave to speak any more at this Time, and

and will resort again to speak of Tithes; wherein some Men say that of Tin, Coal, and Lead, no Tithe should be paid when they be sold by the Owner of the Ground, because it is Part of the Inheritance, and it is more rather a Destruction of the Inheritance than any Increase. And therefore they say, That if a Man take a Tin-work, and give the Lord the xth Dish, according to the Custom, that the Lord shall pay no Tithe of that xth Dish, neither predial nor personal: But if the other that taketh the Work have Gains and Advantage by the Work, it seemeth that it were not against Reason that he should pay a personal Tithe of his Gains, the Charge deducted.

Doct. I pray thee shew me first what thou takest for a personal Tithe, and upon what Ground personal Tithes be paid, as thou thinkest, so that one of us mistake not another therein.

Stud. I will with Good-will. And therefore thou shalt understand that, as I take it, personal Tithes be not paid for any Increase of the Ground, but for such Profit as cometh by the Labour or Industry of the Person, as by buying and selling, and such other: And such personal Tithes, as I take it, must be ordered after the Custom, and the Church hath not used to levy those Tithes of Compulsion, but by Conscience of the Parties. Nevertheless Raymond saith, that it is good to pay personal Tithes, or with the Assent of the Parson to distribute them to poor Men, or else to pay a certain Portion for the whole. But as Innocent saith, where the Custom is that they should be paid, the People be bound to pay them as well as Predials, the Expences deduct. Howbeit

deit in the Church of England they use to sue for such personal Tithes as well as for Predials: And that is by Reason of the Constitution provincial that was made by Robert Winchelsey, by the which it was ordained, that personal Tithes should be paid of Crafts and Merchandise, and of the Lucre of Buying and Selling, and in likewise of Carpenters, Smiths, Weavers, Masons, and all other that work for Hire, that they shall pay Tithes of their Hire, except they will give any certain thing to the Use or the Light of the Church, if it so please the Parson. And in another Place the said Archbishop saith, That of the Pawnage of Woods and such other things, &c. and of Fishings, Trees, Bees, Doves, and of divers other things there remembred, and of Crafts, and of Buying and Selling, and of the Profits of divers other things there recited, every Man should help satisfie competently in the Church, to the which they be bound to give it of Right, no Expences by the giving of the said Tithes deducted or withholden, but only for the Payment of Tithes of Crafts, and of Buying and Selling. And by Reason of the said Constitutions provincial, sometimes Suits be taken in the Spiritual Court for personal Tithes, and therefore many Men do marvel because Deductions many times must be referred to the Conscience of the Parties. And they marvel also why a Law should be made in this Realm for paying of personal Tithes, more than there is in other Countries. And here I would gladly move thee farther in one thing concerning such personal Tithes, to know thy Mind therein, and that is, If a Man give to another a Horse, and he selleth

that Horse for a certain Sum, shall he pay any Tithe of that Sum?

Doct. What thinkest thou therein?

Stud. I think that he shall pay no Tithe: For there, as I take it, the Profit cometh not to him by his own Industry, but by the Gift of another; and, as I take it, personal Tithes be not paid for every Profit or Advantage that cometh newly to a Man, except it come by his own Industry or Labour, and so it doth not here. And also if he should pay Tithe of that he sold the Horse for, he should pay Tithe for the very whole Value of the thing: And, as I take it, the personal Tithes for Buying and Selling shall never be paid for the Value of the thing, but for the clear Gains of the thing. And therefore I take the Cases before rehearsed, where a Man selleth his Land, or pulleth down a House and selleth the Stuff, that he should there pay no Tithe, that it is there to be understood, that he hath that Land or House by Gift or by Discent: For if a Man buy Land, or buy Timber and Stuff of a House, and sell it for Gain, I suppose that he should pay a personal Tithe for that Gain. And this Case is not like to a Fee or Annuity granted for Counsel, where the whole Fee shall be tithed for the Charges deducted, or some certain Sum for it by Agreement: For there the whole Fee cometh for his Counsel, which is by his own Industry; but in the other Case it is not so. And the same Reason as for the personal Tithe might be made of Trees, when they descend or be given to any Man, and he selleth them to another, that he shall pay no personal Tithe.

Doct.

Doct. Methinketh that if the Horse amend in his keeping, and then he sell the Horse, that then the Tithe shall be paid of that that the Horse hath increased in Value after the Gift: And so it may be of Trees, that he shall pay Tithe of that that the Trees may be amended after the Gift or Discent.

Stud. Then the Tithe must be the xth Part of the Encrease, the Expences deducted: And then of Trees the Charges must also be deducted, for it is then a personal Tithe; and there is no Tree that is so much worth as it hath hurt the Ground by the growing: Therefore there can no personal Tithe be paid by the Owner of the Ground when he selleth them, though they have increased in his Time. Nevertheless I will speak no farther of that Matter at this Time, but will shew thee, that if Tin, Lead, Coal, or Trees be sold, that a mixt Tithe cannot grow thereby. For a mixt Tithe is properly of Calves, Lambs, Pigs, and such other that come Part of the Ground that they be fed of, and Part of the keeping, Industry and Oversight of the Owners, as it is said before; But Tin, Lead and Coal are Part of the Ground and of the Freehold, and Trees grow of themselves, and be also annexed to the Freehold, and will grow of themselves. And also the mixt Tithe must be paid yearly at certain Times appointed by the Law or by Custom of the Country; but it may happen that Tin, Lead, Coal, and Trees shall not be felled or taken in many Years, and so it seemeth it cannot be any mixt Tithe. And these be some of the Reasons, which they that would maintain that Statute and Prescription to be good, make to prove their Intent, as they think.

Doct. What think they, if a Man sell the Lops of his Wood, whether any Tithe ought there to be paid?

Stud. They think all one Law of the Trees and of the Lops.

Doct. And if he use to sell the Lops once in xv or xvi Years, what hold they then?

Stud. That all is one.

Doct. And what is the Reason why Tithe ought not to be paid there as well as for Wood under xx Years?

Stud. For they say that the Lops are to be taken of the same Condition as the Trees be, what Time soever they be felled; and that no Custom will serve in that Case against the Statute, no more than it should do of great Trees.

Doct. And what hold they of the Bark of the Trees?

Stud. Therein I have not heard of their Opinion, but it seemeth to be one Law with the Lops.

Doct. I perceive well by that thou hast said before, that thy Mind is, that if a whole Country prescribe to be quit of Tithes of Trees, Corn, and Grass, or of any other Tithes, that that Prescription is good, so that the spiritual Ministers have sufficient beside to live upon. Dost thou mean so?

Stud. Yea verily.

Doct. And then I would know thy Mind, if any Man contrary to that Prescription were sued in the Spiritual Court for Corn and Grass, or any other Tithes, whether a Prohibition should lie in that Case as it did after thy Mind before the said Statute, where a Man was sued in the Spiritual Court for Tithe-Wood.

Stud.

Stud. I think nay.

Doct. And why not there, as well as it did where a Man was sued for the Tithe-Wood?

Stud. For as I take it, there is great Diversity between the Cases, and that for this Cause: There is a Maxime in the Law of England, that if any Suit be taken in the Spiritual Court whereby any Goods or Lands might be recovered, which after the Grounds of the Law of the Realm, ought not to be sued there, though percase the King's Court shall hold no Plea thereof, that yet a Prohibition should lie: And after when it had continued long that no Tithes were paid of Wood, because of the said Prohibition, and that after by Process of Time some Curates began to ask Tithes of Wood, contrary to the Law, and contrary to the said Prescription, so that Variance began to arise between Curates and their Parishioners in that behalf; then for appeasing the said Variance the said Statute was made, and that, as it seemeth, more at the calling on of the Spirituality than of the Temporalty: For the Statute doth not expresly grant that the Prohibition in that Case of Tith-Wood should lie so largely as some say it lay by the Law; howbeit it doth not restrain the Common Law therein, as it appeareth evidently by the Words of the Statute. And so after some Men, it appeareth before the Statute, and also after the Statute, (as I have touched before) that the Spiritual Court ought not in that Case to have made any Process for Tith-Wood: And therefore if they did, a Prohibition lay by the Common Law. And like Law is if the Spiritual Court make Process upon such Legacy

as by the Law of the Realm is void. As if a Man bequeath to one another Man's Horse, and the Spiritual Court thereupon maketh Process to execute that Legacy, there a Prohibition lieth: For it appeareth evidently in the Libel, if all the Truth appeareth in the Libel, that in the Law of the Realm the Legacy is void to all Intents; and that he to whom the Legacy is made shall neither have the Horse nor the Value of the Horse. And in like wise if a Man sell his Land for a C l. and he is sued after in the Spiritual Court for Tithe of the said C l. there a Prohibition shall lie; for it appeareth in that Case openly in the Libel that no Tithe ought to be paid, and that the Spiritual Law ought not in that Case to make any Process whereby the Goods of him that sold the Land might be taken from him against the Law of the Realm. And upon this Ground it is, that if a Man were sued in the Spiritual Court now sith the Statute for a Mortuary, that a Prohibition should lie, for it it appeareth in the Libel, that sith the Statute there ought no Suit to be taken for Mortuaries: And the same Law is, if any Suit were taken in the Spiritual Cuurt for a new Duty, that is of late taken in some Places upon Leases of Parsonages and Vicarages, which is called a Dimission noble, for it appeareth evidently in the Libel, if any be made thereupon, that no such Process ought by the Law of the Realm to be made in that behalf. But in the case of Tithe-Corn or Grass, or such other things, wherein thou hast desired to know my Mind, there appeareth nothing in the Libel, but that the Suit thereof of Right appertaineth to the Spiritual Law, and so for any thing

thing that appeareth the Party may be holpen in the Spiritual Court by the Prescription. And if the Case were so put, that in the Spiritual Court they would not allow the said Prescription, yet I think no Prohibition shall lie. For though the Spiritual Judges in a Spiritual Matter deny the Parties of Justice, yet the King's Laws cannot reform that, but must remit it to their Conscience. But if there were some Remedy provided in that Case, it were well done; For some Men say, that in the Spiritual Court they will admit no Plea against Tithes. And also if a Composition were made by Assent of the Patron, and also of the Ordinary, between a Parson and one of his Parishioners, that the Parson and his Successors should have for a certain Ground so many Quarters of Corn for his Tithe yearly, and after, contrary to the Composition, the Parson in the Spiritual Court asketh the Tithes as they fall; that in this Case no Prohibition should lie; ne yet though the Case were farther put, that the Composition were pleaded in the Court, and were disallowed: But all resteth in the Conscience of the Judge Spiritual, (as is said before.) Howbeit because some be of Opinion that a Prohibition should lie in this last Case, therefore I will refer it to the Judgment of other: But in the Case of Prescription, before rehearsed, I take it for the clearer Case, that no Prohibition should lie, as I have said before. And I beseech our Lord, that this Matter, and such other like thereto, may be so charitably looked upon, that there be not hereafter such Divisions, ne such Diversities of Opinions therein, as has been in time past, whereby hath followed great Costs and

Charges to many Persons in this Realm: And that hath moved me to speak so far in this Chapter, and in divers other Chapters in this present Book, as I have done: Not intending thereby to give Occasion to any Person to withhold his Tithes that of Right ought to be paid, ne to alter the Portion therein before accustomed; but that (as methinketh) they ought to be claimed by the same Title as they ought to be paid, and by none other: And that it may also somewhat appear that the said Statute of 45 Edw. 3. was well and lawfully made, and upon a good reasonable Consideration, and that the said Prescription is good also; so that no Man was in any Danger of Excommunication for the making of the said Statute, nor yet is not for the observing thereof, ne yet of the said Prescription, as it is noted by some Persons that there should be. And thus I commit thee unto our Lord, who ever have both thee and me in his blessed keeping everlastingly. Amen.

FINIS.

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